Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

CHRISTIAN A. HANSEN and ALFRED R. TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the responsible corporate officer doctrine can be stretched to hold a person liable where that person no longer had the authority or the capacity to prevent the violations charged and was not in a decision-making role for the corporation at the time the violations occurred.

(2) Whether a criminal conviction based on the responsible corporate officer doctrine for violations of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d) & (e), the Clean Water Act, 33 U.S.C. § 1319(c), and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b) requires the defendant to have actual knowledge of each element charged in the offense.

(3) Whether corporate officers and employees of a corporation in bankruptcy may be liable for violations of environmental statutes despite bankruptcy laws that deprive them of the authority to act to correct or prevent the violations.

PARTIES TO THE PROCEEDING

Randall W. Hansen, a defendant below, has been served as a respondent herein.

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Christian A. Hansen and Alfred R. Taylor respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, *United States v. Hansen*, (App. A, *infra*, 1a-76a), is reported at 262 F.3d 1217. The opinion of the district court, *United States v. Hansen*, (App. B, *infra*, 77a-117a), is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 24, 2001. Petitioners timely filed a petition for rehearing and rehearing en banc, which the Court of Appeals denied on October 26, 2001 (App. C, *infra*, 118a-119a). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d) & (e) (App. D, *infra*, 126a-132a), the Clean Water Act, 33 U.S.C. § 1319(c) (App. D, *infra*, 120a-126a) and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b) (App. D, *infra*, 133a-135a). Those provisions are set forth in full in App. D to this Petition.

STATEMENT OF THE CASE

A. Factual Background

LCP Chemicals-Georgia ("LCP"), a division of Hanlin Group, Inc. ("Hanlin"), owned and operated an industrial plant on Ross Road in Brunswick, Georgia ("Brunswick plant") of approximately 550 acres, which Hanlin purchased in late 1979. At the Brunswick plant, LCP used a mercury cell, chlor-alkali process to manufacture chlorine gas, sodium hydroxide, and bleach, primarily for the pulp and paper industries. In the chlor-alkali process operations, a concentrated solution is electrochemically dissociated into elemental sodium and chlorine gas, with contaminated wastewater and waste sludges generated in the process.

Prior to the advent of environmental statutes in the 1970s, multiple companies, including ARCO, Georgia-Power Company and Allied Chemical ("Allied"), had operated for approximately 50 years at the site unregulated by any environmental requirements. Now a Superfund site, the Brunswick site is being cleaned at the expense of owners whose environmental contamination predated LCP's presence at the site.

LCP continued the mercury cell chlor-alkali process that had been employed previously by Allied at the Brunswick plant. Essentially, multiple individual mercury cells housed in two large rooms (Cellrooms 1 and 2) processed material to make products. Those cells contained mercury, which regularly required replenishment. The operations also utilized other chemicals and produced hazardous substances. Those processes generated pollutants that were subject to various environmental requirements, including for example,

wastewater discharge limitations on pH, mercury and chlorine set forth in LCP's National Pollutant Discharge Elimination System ("NPDES") permit No. GA 003247. LCP's NPDES permit authorized the Brunswick plant to store wastewater on the floor of Cellrooms 1 and 2 while awaiting treatment in LCP's wastewater treatment plant. LCP also generated hazardous wastes subject to RCRA regulation.

The Brunswick plant operations also were subject to Occupational Safety and Health Administration ("OSHA") regulations designed to ensure for the protection and safety of workers. To protect workers who might be exposed to mercury vapors in the mercury cell process, LCP employed an extensive plant inspection and mercury urinalysis program, in which workers periodically were sampled. This program, as well as employee education, training and quality assurance measures, were developed by Dr. Leonard Goldwater and Dr. Woodhall Stopford, occupational physicians, researchers and internists at Duke University Medical Center. Those workers exhibiting elevated mercury levels could not return to work until they had been examined by a physician, and were relocated immediately to other plant locations away from the mercury cells.

Because LCP's NPDES permit enabled LCP to retain water on the floor of Cellrooms 1 and 2, prior to treatment by LCP's wastewater treatment plant, that water's proximity to the electricity in the cells inherently posed some minor electrical shock and chemical burn risks. OSHA specifically addressed these risks by requiring LCP to install elevated walkways that positioned workers away from freestanding water. Further, LCP employed an electricity lockout program to avoid potential shocks. LCP's operations employed chemicals including both acidic and caustic substances that

could irritate or burn skin. LCP minimized that risk by providing protective equipment to minimize mercury vapor exposure and preclude skin contact, proximately located showers to relieve inadvertent contact, and first aid stations and training. LCP also held regular safety meetings and plant safety inspections. LCP policies also authorized all employees, including those in the cellroom, to work elsewhere in the facility if they were at any time concerned about their safety.

LCP's parent corporation, Hanlin, filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code on July 10, 1991. Those bankruptcy proceedings severely restricted the discretionary funds available to Hanlin, including funds for maintenance and repair, as well as for environmental compliance at the Brunswick plant. The Bankruptcy Court ordered Hanlin to set aside $7,000 - $10,000 per day for professional fees, including special outside environmental counsel (Dechert, Price and Rhoads). Management continued day-to-day management of the operations, but any capital and extraordinary expenditures were subject to Hanlin Board of Directors, Creditors' Committee and Bankruptcy Court approval. Sales of assets were subject to Bankruptcy Court approval, as were the uses of the resulting funds. Often the funds from sales were not made available for use by Hanlin management. Ultimate decision-making authority about major policies, such as whether to close the Brunswick plant or to continue to operate it, was not reposed in Hanlin management, but resided instead with the Board, the Creditors' Committee and the Bankruptcy Court.

Intense industry competition caused the declining position of the company and its cash shortfall. As a result,

with the support of the Creditors Committee and Bankruptcy Court, Hanlin sought a buyer for the Brunswick plant (and other facilities it owned). Throughout the spring and summer of 1993, LCP negotiated with Allied (the previous owner), HoltraChem and others to purchase the Brunswick plant. Allied was particularly interested in making the purchase, which would have allowed Allied to postpone and possibly avoid environmental cleanup costs for which it was responsible.

For the five months beginning in February 1993, Alfred Taylor was the Brunswick plant manager. Taylor resigned his position on July 16, 1993. In the late summer and early fall of 1993, Allied agreed to advance funds to LCP to enhance environmental compliance, including emergency expansion of wastewater treatment capacity by using idle tanks, with those funds to be applied to the purchase price when the companies closed on the transaction.[1] The Georgia Environmental Protection Department ("GA EPD") participated in those LCP-Allied negotiations to ensure environmental compliance. Ultimately, GA EPD's insistence that Allied agree to clean up the adjacent river if it acquired the Brunswick plant caused Allied to forego purchase of the facility. Shortly thereafter, in early February 1994, the facility was closed.

Due to the cash shortfall occasioned by the bankruptcy, LCP experienced operational and environmental compliance difficulties in 1993 and until the plant closure in 1994. Most notably, LCP struggled to meet its NPDES permit requirements, which it duly reported to GA EPD in daily, weekly and monthly Discharge Monitoring Reports.

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1. An Allied employee, Mark White, was assigned by Allied to run the Brunswick plant as an LCP employee, formally commencing on October 18, 1993.

The volume of wastewater increased and exceeded the LCP wastewater treatment plant capacity, compelling LCP to utilize the floor of Cellrooms 1 and 2 and idle tanks to hold the wastewater while awaiting treatment. Faced with excessive wastewater, LCP also chose to pump the water to empty Bunker C oil tanks for storage before treatment and final discharge from the wastewater treatment plant. During 1993, LCP experienced other operational problems, including an accidental bleach spill, which the company promptly reported to GA EPD.

As a result of the wastewater compliance problems, GA EPD informed LCP that it would revoke LCP's NPDES permit on September 23, 1993. LCP appealed that proposed permit revocation, which legally stayed the revocation. On November 19, 1993, GA EPD sought a TRO ordering the Brunswick plant closed. State court Judge Amanda Williams was assigned the matter and personally visited the Brunswick plant on December 6, 1993, with representatives from LCP, GA EPD, Allied Signal and HoltraChem. After the tour with Judge Williams, the GA EPD withdrew the request for a TRO.

Following the eventual closure of the plant in 1994, GA EPD turned the Brunswick plant over to the U.S. Environmental Protection Agency ("U.S. EPA"). U.S. EPA listed the facility as a Superfund site and commenced a cleanup, which remains ongoing. Predecessors to LCP at the site, Allied, ARCO and Georgia-Power Company, are paying for the cleanup.

The Government then chose to criminally prosecute individuals who had been employed by Hanlin for the environmental problems that LCP experienced in 1993 and 1994. Federal jurisdiction in the district court arose from

the criminal indictments against those individuals for violations of United States environmental statutes RCRA, CERCLA, and CWA.

The criminal indictments charged the Petitioners with exceeding the NPDES permit limits during specified time periods between June 1993 and January 1994 (Counts 2-21); for storing wastewater on the cellroom floors and permitting some to escape to the environment during specified time periods between May 29, 1993 and February 1, 1994 (Counts 22-32); for storing wastewater in Bunker C oil tanks between July 23, 1993 and February 1, 1994 (Count 33); for knowingly endangering employees by exposing them to impermissibly stored wastes and wastewater between May 29, 1993 and February 1, 1994 (Count 34); for failing to notify the U.S. Government of unpermitted releases of chlorine or wastewater to the environment between July 21, 1993 and October 23, 1993 (Counts 35-41); and for conspiring to commit those violations between July 1, 1985 and February 1, 1994 (Count I).

Seventy-five year old Petitioner Christian Hansen is one of the charged and convicted employees. He formed Hanlin in 1972, and served as President and Chief Executive Officer ("CEO") and Chairman of the Board of Directors until early April 1993. At that time, he was ousted as CEO and Chairman of the Board by the Bankruptcy Court, at the Board's request. Thereafter, he remained an employee and a Board member. As an employee, he undertook specific projects at the request of the Board. In late June 1993, the Board asked him to visit the Brunswick plant and to investigate the operational and environmental problems. When Taylor resigned as Brunswick plant manager on July 16, 1993, Christian Hansen became *de facto* plant manager for approximately two months, until

Allied/HoltraChem invested money in the facility and installed Mark White as plant manager on October 18, 1993. Prior to that date, Christian Hansen returned to New Jersey on an emergency basis for medical treatment of his acute rheumatoid arthritis. He remained there as a Hanlin employee with no authority, responsibility or involvement with the Brunswick plant.

Petitioner Alfred Taylor worked for LCP at the Brunswick plant from 1979 until February 1994. As plant manager, Taylor stressed safety and assured employees of their right to refuse to perform any activity if they felt it was unsafe. Taylor reported overflow to GA EPD and to the LCP Board of Directors. A few months after becoming plant manager, Taylor proposed that the Brunswick plant be shut down piecemeal to permit rebuilding one cellroom at a time. He prepared a statement of the costs associated with this alternative, and gave his proposal to Randall Hansen. Randall later told Taylor that the Board would not allow the Brunswick plant to be closed. Approximately two months later, on July 16, 1993, Taylor resigned as plant manager. In September 1993, Hansen requested Taylor to return to the Brunswick plant. Taylor agreed to return only on the condition that he would not have to assume managerial type duties. Taylor remained at the Brunswick plant until it closed in February 1994.

B. Proceedings Below

A jury convicted Christian Hansen of all counts, including two counts in which the operative events predated his tenure at the Brunswick plant and 19 counts that arose from events that occurred after his departure. The district court denied Christian Hansen's post-trial request for a

judgment notwithstanding the verdict and/or a new trial on April 26, 1999. The Eleventh Circuit affirmed the conviction and denial of post-trial relief from the judgment.

A jury convicted Alfred Taylor of 20 counts, including 11 counts that arose from events that occurred after he was no longer a manager at the Brunswick plant. The district court denied Taylor's post-trial request for a judgment notwithstanding the verdict and/or a new trial on April 26, 1999. The Eleventh Circuit affirmed the conviction and denial of post-trial relief from the judgment.

On August 24, 2001, the Eleventh Circuit Court of Appeals issued a 74-page *per curium* opinion, in which the Court affirmed all of the Petitioners' convictions on all counts. In affirming Petitioners' convictions, the Eleventh Circuit did not acknowledge its improper reliance on the RCO doctrine as a basis for finding liability under environmental criminal statutes. The Eleventh Circuit also failed to acknowledge its departure from the reasoning in *Park* and other Circuit Courts of Appeals which clearly hold that a person cannot be criminally liable for violations that occurred when that person was not in a position of responsibility or control.

C. Jurisdiction Below

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, because the prosecution was brought by the United States under federal environmental laws, including the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d) & (e); and the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b).

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case because the *Hansen* decision is at odds with this Court's interpretation of the requirements of the responsible corporate officer ("RCO") doctrine and fundamental precepts of criminal law. The Eleventh Circuit held Hansen liable for 22 violations and Taylor liable for 11 violations that occurred when they were not corporate officers, and when Hansen was not working at, or affiliated with, the Brunswick plant, and Taylor had no managerial duties at the Brunswick plant.[2] The Eleventh Circuit acknowledged that Hansen was not an officer of the corporation, was not even present at the Brunswick plant and had "left his decision-making position" at the time violations underlying 22 counts of his conviction occurred. (*See* Op., App. A at 11a-12a, 28a.) The Eleventh Circuit also acknowledged that Taylor resigned in July 1993 and only returned to the Brunswick plant as an employee without any remaining managerial or supervisory control. (*Id.*, App. A at 12a.) Then, without so much as a citation, the court affirmed the convictions despite the undisputed facts that neither Hansen nor Taylor were officers of the corporation, neither were in a position of responsibility or authority, and neither could prevent or correct the violations charged.

The RCO doctrine arose from this Court's decision in *United States v. Dotterweich*, 320 U.S. 277 (1943), in which

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2. Hansen Counts 2, 6-10, 14-15, 19-21, 23, 25, 29, 30-32, and 38-40 occurred when he had no authority at the Brunswick plant and was not even working at the plant. Taylor Counts 23, 25, 29-32, and 38-41 all occurred after Taylor resigned from management and returned to the Brunswick plant only as an engineer without any management or supervisory responsibilities.

this Court held that a corporate officer who has a "responsible share in the furtherance of the transaction" could be held liable, in addition to the corporation, for violations of law. This Court determined that the corporate officers who were subject to this liability could be determined by the prosecutors, the trial judges and the juries. That determination proved to be too little guidance, and in *United States v. Park*, 421 U.S. 658 (1975), this Court again considered a corporate officer's liability under the RCO doctrine. In *Park*, this Court gave more specific guidelines, and held that RCO liability could attach "if the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and failed to do so." *Id.* at 673-74. Despite the clarification this Court provided in *Park*, courts have interpreted the scope of RCO liability differently and have applied it inconsistently in prosecutions of corporate officers for environmental crimes.

In *Hansen*, the Eleventh Circuit ignored the necessary ingredient of control as required by *Park*. Its decision is symptomatic of the improper reduction of the Government's burden of proof through the elimination of the *mens rea* requirement that this Court has more recently determined violates the Fifth Amendment right to due process of law. *See Staples v. United States*, 511 U.S. 600, 616 (1994); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994); *see also United States v. Bestfoods*, 524 U.S. 51 (1998) (requiring actual involvement in or control of environmental operations before a parent company may be liable under CERCLA).

The *Hansen* decision conflicts with this Court's prior application of the RCO doctrine because it imposes liability

on persons who had no responsibility or authority to prevent or correct the charged violations. The Eleventh Circuit so distorted the RCO doctrine that it affirmed Hansen's conviction for violations occurring when he was no longer working at the Brunswick plant, after he had returned home to New Jersey, and while he was hospitalized for treatment of his rheumatoid arthritis. Likewise, the Eleventh Circuit twisted the doctrine to affirm Taylor's convictions for violations occurring after he had resigned from his short stint as plant manager, and after he had been lured back to work for the company only after negotiating with them that he would not be in a position that entailed any management or supervisory responsibilities. Despite admitting these facts and without providing any rationale, the Eleventh Circuit affirmed Petitioners' convictions under its flawed interpretation of the RCO doctrine for violations occurring during the time Petitioners were removed from all management and supervisory responsibilities. Under this Court's holding in *Park*, and more recently in *Staples*, *X-Citement Video*, and *Bestfoods*, the Eleventh Circuit should have reversed Hansen's and Taylor's convictions.

Three issues are presented here:

First, despite this Court's clarification of the RCO doctrine in *Park* and other Circuit Courts of Appeals clear holdings that a person must be in actual control of a facility before environmental liability will attach, in affirming the district court's decision, the Eleventh Circuit eliminated the "actual control" requirement. The Eleventh Circuit extended liability to persons who were not corporate officers and had no opportunity to prevent the violations, including Hansen who was not even working at the facility when the violations

occurred. The Eleventh Circuit did not give its reasoning, explain its decision or cite to any authority for this dramatic departure from the RCO doctrine. (*See* Op., App. A at 28a.)

Second, Circuit Courts of Appeals are split on the issue of whether a person convicted under the RCO doctrine must have actual knowledge of each element of the charged violation, even in the face of this Court's clear direction in *Staples and X-Citement* that statutes similar to RCRA and the CWA require a demonstration of *mens rea*. The Eleventh Circuit improperly eliminated the "actual knowledge" standard by deeming the regulations at issue to be public welfare statutes and allowing the jury to convict without the Government proving that the Petitioners had the *mens rea* necessary to commit the violation.

Third, Petitioners present an important issue of federal law that should be settled by this Court: whether criminal liability should be reduced or eliminated when the corporation is in bankruptcy because the corporate officers are no longer in a position to make decisions that could correct or prevent the violations. In the district court, the Government argued to the judge and jury that the Brunswick plant needed to be closed, but Hanlin's filing for bankruptcy protection effectively limited those managers' actual control over the Brunswick plant. Hansen, Taylor and the other corporate officers lacked the authority to take actions such as closing or selling the Brunswick plant, or allocating funds to prevent or correct the violations. In fact, the Board of Directors and the Creditors' Committee specifically refused to close the Brunswick plant when co-defendant Randall Hansen presented Taylor's recommendation that the Brunswick plant be shut down to prevent environmental releases.

I. The RCO Doctrine Requires That The Corporate Officer Be In Actual Control Of The Facility At The Time Of The Occurrence

The Eleventh Circuit, without citation to authority or justification for its decision, unilaterally extended the RCO doctrine to make liable those employees who are not corporate officers, are not in a position of authority or control, and are not working at or associated with the facility at the time the offending releases occurred. By doing so, the Eleventh Circuit has completely ignored this Court's holding in *Park* requiring that a corporate officer have the ability to prevent or correct a violation before that officer will be held liable. Such a requirement is logical, given that the doctrine is titled and based on the necessary fact that the corporate officer be "responsible" for the violation.

Not only does the Eleventh Circuit decision conflict with the holding in *Park*, but it also conflicts with this Court's holding in *United States v. Bestfoods*, 524 U.S. 51 (1998) (interpreting CERCLA). This Court's reasoning in *Bestfoods* is directly applicable to the RCO doctrine issue in this case. In *Bestfoods*, a civil case, the Court considered whether a parent corporation could be liable for the CERCLA violations committed by its subsidiary. Under the CERCLA provision at issue in *Bestfoods*, a person may only be liable if that person "owns" or "operates" a facility. This Court held that "operating" a facility for purposes of CERCLA required managing, directing, or conducting operations specifically related to the release or disposal of hazardous waste or compliance with environmental regulations. *Id.* at 70-71. This Court specifically limited liability to those persons with a direct link to the release of hazardous waste that formed the basis of the statutory violation. Even in the civil context,

this Court recognized that a nexus must exist between a defendant's conduct and the specific activity resulting in the environmental violation. Clearly that same nexus must be present in the criminal context, where defendants face severe penalties and the Government must prove defendant's connection to a violation beyond a reasonable doubt.

The Eleventh Circuit ignored the nexus that this Court held was necessary for liability in *Bestfoods*. The Eleventh Circuit did not cite to *Bestfoods* in its opinion despite the fact that the statutory provision at issue in *Bestfoods*, and the RCRA and CERCLA statutes at issue in this case require a person to "own" or "operate" a facility — essentially to be in a position to control the facility or the activity that forms the basis for the liability. In fact, the Court admitted that the acts occurred "after Hansen left his decision making position," but then casually, without any citation to the record linking Hansen to those acts, stated: "the acts occurred at [Hansen's] direction." (Op., App. A at 28a.) Not only does the Court's statement admit the legal impairment to liability because Hansen was not in "actual control," but it is also factually deficient. The Government did not prove that Brunswick employees followed any of Hansen's directives. Further, the Government did not link any of Hansen's directives with the specific violations that were charged. The Eleventh Circuit simply refused to take a critical look at or address head-on Petitioners' arguments.

Certiorari also is warranted by the conflict in the Circuit Courts of Appeals on the "actual control" issue. The Eleventh Circuit's decision is at odds with the holdings of several other Circuit Courts of Appeals that have addressed the "actual control" issue. *See United States v. Dell 'Aquilla*, 150 F.3d 329 (3d Cir. 1998) (interpreting the Clean Air Act); *United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998)

(interpreting CERCLA), *United States v. Carr*, 880 F.2d 1550 (2d Cir. 1989) (interpreting CERCLA and the CWA). Each of these cases has found that the corporate officer (or corporate parent, as in *Bestfoods*) must exercise actual control before liability attaches.

For example, the Eleventh Circuit decision conflicts with the reasoning used by the Third Circuit in *Dell 'Aquilla*, 150 F.3d at 334 (interpreting the Clean Air Act), a case that is directly on point here. In *Dell 'Aquilla*, the Third Circuit vacated the grant of summary judgment and held that individual defendants had to be directly involved with the operation of a facility at the time that each violation occurred, and that prior involvement with the facility would not result in liability for later violations. *Id.* at 334. The Third Circuit relied on the *Bestfoods* interpretation of "operator" under CERCLA which did not specifically address corporate officer liability, but required the Government to demonstrate that the person being charged actually participated in or had some nexus to the liability-creating conduct. The court reversed the district court because the district court erred in assuming that once liability was demonstrated for a Clean Air Act violation, it was proved for future violations regardless of the capacity of the defendant to control the polluting activity. Similarly, the Third Circuit has rejected the argument that liability attaches based solely on the officer's active involvement in the corporations day-to-day affairs. *United States v. USX Corp.*, 68 F.3d 811, 824-25 (3d Cir. 1995) (holding that to find CERLA liability, the Government must show that the person sought to be held liable actually participated in the liability-creating conduct).

The Sixth Circuit employed the same reasoning in *United States v. Township of Brighton*, 153 F.3d 307 (6th Cir. 1998), which holding that a CERCLA operator had to exert "actual

control" and "must perform affirmative acts" before liability will attach for environmental violations. *Id.* at 314. The Sixth Circuit held that the failure to act, even if coupled with the ability or authority to do so, would not confer operator liability. The Second Circuit considered a similar question in *United States v. Carr*, when it stated that despite its expansive view of who was "in charge" under CERCLA, it still required that "in charge" include only those people who had supervisory control over the facility. 880 F.2d 1550, 1554 (2d Cir. 1989).

The Eleventh Circuit's decision in *Hansen* even conflicts with the Circuit's own reasoning in another environmental case addressing a similar situation. *See Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996) (interpreting CERCLA). In *Redwing Carriers*, the Eleventh Circuit held that partners of a limited partnership were not liable for environmental violations unless they had either participated in the operations of the violating facility, participated in the activities that resulted in the disposal of hazardous substances, or that the partners actually exercised control over or were otherwise intimately involved in the operation of the partnership. *Id.* at 1505. The court required direct involvement by the person in the activities charged as violations of the statutes or evidence that the person was in a position of control.

The Eleventh Circuit ignored the *Redwing Carriers* decision, and its decision in *Hansen* to extend liability to a person who is not a corporate officer and not in actual control stands in stark contrast to the reasoning of the Third Circuit in *Dell 'Aquilla*, the other Circuit Courts of Appeals, and this Court. This departure is more incredible because the court admitted that the acts forming the basis of several of the Counts "continued after Hansen left his decision-making position," while at the same time concluding, without citation to a single

case or the record, that those acts occurred at Hansen's direction. Similarly, the court failed to discuss the Counts where Alfred Taylor was no longer in a position of actual control. Just as the Third Circuit held in *Dell 'Aquilla*, the Eleventh Circuit should have reversed the district court because the Government failed to show that Hansen or Taylor continued to function in a capacity of responsibility or control for each violation of RCRA, the CWA and CERCLA that occurred. *See Dell 'Aquilla*, 150 F.3d at 334.

The Eleventh Circuit's reasoning in *Hansen* is elusive. By holding the Petitioners liable when they were without any power to effect change in Brunswick's environmental operations, the Eleventh Circuit potentially extended liability to a seemingly endless class of employees who may have worked at a facility prior to, during, or after the violation occurred but never had any responsibility for the violation. The decision essentially assumes liability without the necessary showing of a nexus between the act or omission forming the basis of the liability and a person's responsibility for that act or omission as required by the RCO doctrine. This Court has an opportunity to resolve whether Petitioners were appropriately held criminally liable under the RCO doctrine for violations where there was no nexus because Petitioners were not able to exert actual control over the facility at the time the violations occurred.

II. The Fifth Amendment Right To Due Process Was Violated When The Government Failed To Prove That Hansen And Taylor Had Actual Knowledge Of Each Element Of The Offenses

The "actual knowledge" issue has been addressed by this court in *Staples v. United States*, 511 U.S. 600, 616 (1994), and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). In those cases, this Court held that converting a federal statute

that provides criminal penalties into a public welfare statute, rather than treating it as a standard criminal statute as intended by Congress, is unconstitutional because it reduces the Government's burden of proof in violation of the Fifth Amendment right to due process of law. The criminal provisions of the CWA and RCRA do not impose strict liability on a defendant and the lower courts' converting them to public welfare statutes by removing the *mens rea* element is unconstitutional and violates due process.

While the Court has addressed the *mens rea* requirement of other federal statutes, the Court has yet to address the *mens rea* requirement of environmental criminal statutes such as the CWA and RCRA. As Justices Thomas and O'Connor stated in their recent dissent to the denial of a petition for a writ of *certiorari* in *Hanousek v. United States*, 528 U.S. 1102, 1103-05 (2000), now is the time for the Court to resolve the split in the Circuit Courts of Appeals and determine that the CWA and RCRA cannot be public welfare statutes in light of their express *mens rea* requirement and the serious penalties they impose. This case presents the Court an opportunity to clarify the confusing and contradictory standards expressed by the Circuit Courts of Appeals and reaffirm the holdings of *Staples* and *X-Citement* in the environmental context.

The confusion in the *scienter* requirements of the RCO doctrine results from the failure of prosecutors and courts to distinguish the occasions when the RCO doctrine is applied to true public welfare statutes from those where the RCO doctrine is applied to regulations that call for explicit knowledge and impose severe criminal penalties, such as the CWA and RCRA. *See* Randall S. Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act*, 9 N.Y.U. Envtl.

L. J. 304, 311-19 (2001). Several courts have properly held the government to its burden to prove defendant's knowledge of each element of the crime and declined to apply the public welfare doctrine to environmental statutes. *See United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) (declining to hold that the CWA is a public welfare statute); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 51-52 (1st Dist. 1991) (distinguishing RCRA, which requires specific intent, from the public welfare statutes at issue in *Dotterweich* and *Park*); *see also United States v. White*, 766 F. Supp. 873, 894-95 (E.D. Wash. 1991) (same). Other courts have applied the gloss of the public welfare doctrine to knowing violations of RCRA and the CWA and held persons criminally liable as responsible corporate officers without the requisite showing of specific intent. *See United States v. Kelley Technical Coatings, Inc.*, 157 F.3d 432, 438-39 (6th Cir. 1998); *United States v. Wilson*, 133 F.2d 251, 262-63 (4th Cir. 1997).

In this case, the Eleventh Circuit without explanation declined to follow this Court and those Circuits that have properly determined that the public welfare doctrine does not apply to RCRA and the CWA. The Eleventh Circuit's decision directly conflicts with the reasoning of this Court in both *X-Citement Video*, 513 U.S. 64, and *Staples*, 511 U.S. at 618, and with the reasoning of the Fifth Circuit in *Ahmad*, 101 F.3d at 39, and the First Circuit in *MacDonald*, 933 F.2d at 51-52. In *Hansen*, the Eleventh Circuit has vastly broadened the scope of liability in the environmental criminal arena — despite the grave penalties that may result from convictions under RCRA and the CWA.

In *Staples*, this Court reaffirmed the common law rule that the Government must prove *mens rea* for statutory crimes. This Court rejected the Government's argument that the National

Firearms Act ("NFA") was a public welfare statute simply because it regulated inherently dangerous activity. An important element of this Court's reasoning was that the severe penalties of up to ten years imprisonment that may result from NFA violations was a reason to maintain the Government's burden of proof. This Court's statement in *Staples* applies equally here: "punishing a violation as a felony is simply incompatible with the theory of the public welfare offense." *Staples*, 511 U.S. at 618.

In line with *Staples*, this Court next reversed a Ninth Circuit decision that interpreted a statute as lacking a *mens rea* requirement. *See X-Citement Video*, 513 U.S. 64. In interpreting the Protection of Children Against Sexual Exploitation Act of 1977, this Court held that the "knowingly" requirement applied to each element of the crime. When making its decision, this Court stated that "[o]ur reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id.* at 70. This Court again rejected the argument that a statute imposing harsh penalties could be considered a public welfare statute and determined that the statute's *mens rea* requirement must be applied to each element of the crime. *Id.* at 71. The statute in *X-Citement Video* — like the CWA and RCRA — carried penalties of up to ten years in prison and substantial fines.

Members of this Court have expressly called into question the application of the public welfare doctrine to the CWA in terms that are applicable equally to RCRA. *Hanousek*, 528 U.S. at 1103-05. Justices Thomas and O'Connor noted that the seriousness of the penalties (felonies with three to six years in prison) "counsels against concluding that the CWA can

accurately be classified as a public welfare statute." *Id.* at 1104. More troubling to the Justices was the broad sweep of such a classification: classifying criminal statutes, such as the CWA, as public welfare statutes simply because they regulate conduct that is known to be subject to extensive regulation and that may involve risk to the community would criminalize almost all industrial activities. *Id.* In *Hansen*, Petitioners were sentenced to harsh penalties — imprisonment for nine years for Hansen and six and one-half years for Taylor. These sentences arose from violations of the CWA, among other environmental statutes, and illustrate the Justice's reasoning in *Hanousek* against classifying the CWA as a public welfare statute.

The Fifth Circuit followed the reasoning of *X-Citement Video* and *Staples* and held that the CWA was not a public welfare statute and that the Government had to prove *mens rea* before liability could be found. *Ahmad*, 101 F.3d at 390-91. The Fifth Circuit held that the CWA was not a public welfare statute because CWA crimes were classified as serious felonies and there was no clear statement from Congress that *mens rea* was not required to find a violation. *Id.* at 391. The Fifth Circuit also considered whether the jury instructions in *Ahmad* adequately conveyed the *mens rea* requirement. The Court held that the instructions were faulty and required reversal of the conviction because "[a]t best, the jury charge made it uncertain to which elements 'knowingly' applied." *Id.* Because this presented the reasonable likelihood that the jury did not apply the "knowingly" element to each element, the Fifth Circuit reversed the defendant's conviction.

While the First Circuit's decision in *MacDonald* predates this Court's decisions in *Staples* and *X-Citement Videos*, it applies the same principles to RCRA in reversing a conviction based on the presumption that the defendant knew of the

violations simply because he was a corporate officer. 933 F.2d at 55. The court stated: "[W]e know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute. Especially is that so where, as here the crime is a felony carrying possible imprisonment of five years and, for a second offense, ten." *Id.* at 45 (citation omitted). The court held that a mere showing of official responsibility under *Dotterweich* and *Park* was not an adequate substitute for the government proving knowledge. *Id.* at 55.

The Eleventh Circuit's reasoning in this case is directly contrary to this Court's reasoning in *X-Citement Video* and in *Staples*, as well as the Fifth Circuit's reasoning in *Ahmad* and the First Circuit's reasoning in *MacDonald*. Here, the Eleventh Circuit ignored those precedents and did not instruct the jury that the Government had to prove that the Petitioners acted "knowingly" for each element of the offense. Because of the blanket use of the RCO instruction, Hansen and Taylor were convicted of violations under each statute without proof that they had the requisite *scienter*.

This was especially true for Count 34 under RCRA for Knowing Endangerment, a violation that carries a penalty of up to ten years imprisonment. In *Hansen*, the jury was not instructed of the appropriate *mens rea* element of the Knowing Endangerment charge. A "Knowing Endangerment" violation requires a finding that Petitioners knew that their actions created an imminent danger of death or serious bodily injury, as required by the statute. 42 U.S.C. § 6928(e). (*See* App. D at 129a.) Specific, not inferred, knowledge of the imminent danger is the standard for a violation. 42 U.S.C. § 6928(f). (*See id.*) Because the district court gave an RCO instruction at trial, the jury was allowed to convict Hansen and Taylor based on their roles in

the corporation and the inference that they knew of a RCRA violation instead of proof that they knowingly failed to prevent, detect or correct a violation, as required by the statute.

Like *MacDonald* and *Ahmad*, this case should be reversed. First, the Petitioners were convicted based on their corporate status, not based on their actual knowledge. Second, the district court failed to give effect to an express knowledge requirement found in the statute. Third, the crime for which they were convicted is a felony that carried severe penalties of up to ten years imprisonment.

The jury instructions for the charges under the CWA also were faulty and warrant reversal of the Petitioners' convictions. The CWA expressly requires proof that the person charged with the violations possess the *mens rea* specified in the statute. Courts have recognized that this *mens rea* requirement is not superceded by the use of the RCO doctrine. The result is that an officer's corporate status is just one of several factors that lead to an inference of actual knowledge, the *mens rea* standard in the CWA. The CWA specifically confers liability on "any responsible corporate officer," 33 U.S.C. § 1319(c)(6), making the question of responsibility one of the elements necessary to prove a CWA violation. (*See* App. D at 125a.)

The district court failed, however, to instruct the jury about the circumstances that determine when a corporate officer may be held responsible — including issues about the officer's knowledge, capacity to prevent, and knowing failure to prevent, the offending discharge. Instead of requiring the Government to prove this element, the district court instructed the jury that "wherever I have used the term 'corporate officers,' I mean responsible corporate officers." By doing so, the district court eliminated the CWA *mens rea* element, converted the CWA into a strict liability statute and allowed Petitioners to be convicted

merely because of their status. The district court's holding and the Eleventh Circuit's affirmation of that holding have been specifically rejected by the Fifth Circuit in *Ahmad* and by Justices Thomas and O'Connor in their dissent to the denial of *certiorari* in *Hanousek*, and resulted in Christian Hansen and Alfred Taylor being sentenced to nine years and six and one-half years imprisonment, respectively, without proper proof.

The Eleventh Circuit's reliance on the Ninth Circuit's *Iverson* case to justify its decision on the *mens rea*, issue also is without merit. A closer look at *Iverson* demonstrates that it does not support the reasoning of the Eleventh Circuit. *See United States v. Iverson*, 162 F.3d 1015 (9th Cir. 1998). In fact, the Eleventh Circuit's decision is at odds with the Ninth Circuit's approval of the RCO jury instruction in *Iverson*. *Id.* In *Iverson*, the Ninth Circuit approved an instruction that required the jury to find: that the defendant had knowledge of the facts that lead to the offending discharge of pollutants; that the defendant had the authority and capacity to prevent the discharge; and that the defendant failed to prevent the ongoing discharge. *Id.* at 1022. In *Hansen*, the jury was allowed to convict without specifying that liability was arising under the RCO doctrine, and without requiring a finding that the Petitioners had knowledge of the facts that lead to the offending discharge of pollutants.[3]

This Court has held that where there is a reasonable likelihood that the jury has applied the instructions in a manner that does not give full effect to the statute at issue, the jury may

3. Although the defendant in *Iverson* and this case faced similar charges, the facts in *Iverson* are distinct from those here. In *Iverson*, the defendant personally discharged the pollutants, ordered discharge at an alternative location for easier release, conducted the business of the company even after he was "retired," and knew that his conduct was illegal.

have been misled about the elements of the offense. When a jury is instructed on an impermissible legal theory, reversal is warranted. *Boyde v. California*, 494 U.S. 370, 380 (1990). In addition, when an instruction is ambiguous and capable of an erroneous interpretation, reversal is warranted when there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.* In this case, any one of these faulty instructions warrants reversal of the Petitioners' convictions, and as a whole, the improper jury instructions overwhelming weigh in favor of reversal.

The RCO doctrine should not eradicate the *mens rea* requirements of the underlying statute that attaches liability, and under the CWA and RCRA the corporate officer must have "actual knowledge" of the situation giving rise to the crime. Nevertheless, Hansen's and Taylor's convictions under the CWA and RCRA were reached without the Government proving that the Petitioners had the *mens rea* necessary to find liability. In doing so, the Eleventh Circuit affirmed the misapplication of the RCO doctrine by permitting the CWA and RCRA to be converted into public welfare statutes and reducing the government's burden of proof in contravention of the decisions of this Court and other Circuit Courts of Appeals.

III. *Certiorari* Is Necessary To Resolve The Conflicting Objectives Of The Federal Bankruptcy Act And Environmental Statutes

This Court should also grant *certiorari* to resolve the friction between the bankruptcy and environmental regulations. The control that Petitioners had in this case over the Brunswick plant was further inhibited by Hanlin's bankruptcy, yet the Eleventh Circuit failed to address Petitioners'

arguments that their management authority and responsibilities were fundamentally changed by Hanlin's bankruptcy, limiting its perfunctory discussion to Randall Hansen's arguments. (*See* Op., App. A at 29a-31a.)

Bankruptcy laws and environmental laws have competing objectives. While the objective of bankruptcy laws is to preserve a corporation's assets for reorganization or for the benefit of its creditors, the objective of environmental laws is to protect the health and environment, without consideration of the cost to effectuate that goal. Courts have been forced to balance between these competing goals, and the tension between those two objectives has long been recognized. *See In re Chicago, Milwaukee, R.R.*, 3 F.3d 200, 201 (7th Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991) ("We agree that the Bankruptcy Code and CERCLA point toward competing objectives.").

While the Eleventh Circuit's statement that bankruptcy does not insulate a debtor from environmental statutes (*see* Op., App. A at 30a) is true to some degree, the reality is much more clouded and courts have limited a debtor's environmental liability in bankruptcy although conflicts remain regarding the circumstances that warrant such limitation. *See Ohio v. Kovacs*, 469 U.S. 274, 281 (1985) (state environmental clean-up order that can be performed only by the payment of money is a claim against the bankrupt estate and is dischargeable in bankruptcy); *In re Chateaugay*, 944 F.2d at 1002 (claim resulting from pre-petition release may be dischargeable); *United States v. Whizco*, 841 F.2d 147, 150-51 (6th Cir. 1988) (to the extent an injunction required debtor to expend resources to clean up site, it was a dischargeable claim); *but see Mid-Atlantic Nat'l Bank v. New Jersey Dept. of Envt'l Protection*, 474 U.S. 494, 506 (1986) (limiting ability of trustee to abandon contaminated property);

In re Nat'l Gypsum, 139 B.R. 397, 407 (Bankr. N.D. Tex. 1992) (refusing to discharge debts associated with debtor's undiscovered sites).

The above-mentioned cases highlight the conflicting objectives of bankruptcy and environmental laws and courts' attempts to resolve those conflicts, but they do not address the issue presented to the Eleventh Circuit and this Court by the Petitioners. Nor did the Eleventh Circuit's perfunctory analysis (*see* Op., App. A at 29a-31a), because Petitioners did not contend that LCP, as the debtor, should be absolved of environmental liability. Petitioners argued that the bankruptcy shifted control of the corporation from its management to the Bankruptcy Court, the Board of Directors and the Creditor's Committee, imposing an overlay of bankruptcy rules that severely circumscribed management's ability to take action on behalf of the corporation. Thus, the issue raised before this Court, which has not been addressed below or by other courts, is whether a corporate officer or employee can be held criminally liable for environmental violations even when he had no authority to act to prevent, control or mitigate those violations because the corporation was in bankruptcy.

Once LCP entered bankruptcy as a debtor-in-possession, the Board and the bankruptcy court, not Petitioners, possessed the authority to commit the resources that the Government argues were necessary to alleviate the environmental conditions at the Brunswick plant.[4] *See CFTC v. Weintraub*, 471 U.S. 343, 352-53 (1985); *In re Allegheny Int'l, Inc.*, 158 B.R. 343, 353-54 (Bankr. W.D. Pa. 1992). Under the Bankruptcy Code, a debtor-in-possession's officers and directors are placed in the dual role of running the corporation in the ordinary course of business

4. The Brunswick plant managers could not make a decision to shut down the Plant, yet under the Government's theory, that was the way to cure its problems.

and carrying out the fiduciary responsibilities of a trustee, including maximizing the value of the estate for the debtor's creditors. *See Tenn-Fla Partners v. First Union Nat'l Bank of Fla.*, 229 B.R. 720, 736 (Bankr. W.D. Tenn. 1999). Consequently, management has conflicting responsibilities placed on it when confronted with an environmental expense that has both the possibility of depleting the estate and the potential to incur liability for environmental violations.

Management's control is further limited because the corporation is under the control of the bankruptcy court. *See In re Schepps Food Stores, Inc.*, 160 B.R. 792, 799 (Bankr. S.D. Texas 1993) ("Bankruptcy Code provides a supplemental scheme of governance over the estate"). In order to "use, sell, or lease" its property "other than in the ordinary course of business," a debtor-in-possession, must obtain approval from the bankruptcy court. 11 U.S.C.A. § 363(b)(1). Environmental expenses for compliance and cleanup are expenses that may be outside of the ordinary course of business and require bankruptcy court approval. *See In re Allegheny Int'l*, 158 B.R. at 353-54. This shift in control, the new duties of a debtor-in-possession, and the limits placed on an officer's or director's actions as a result of bankruptcy must have a corresponding effect on the criminal liability of individual officers or directors at a bankrupt company.

In this case, after the bankruptcy petition was filed, funds for maintenance, repair and environmental compliance were restricted, and all decisions for continuing plant operation, major projects, capital and extraordinary expenditures, and the sale of assets, were subject to approval by the Board of Directors, the Creditors Committee, and the Bankruptcy Court. Petitioners tried, but were not allowed, to adequately allocate funds to correct the offending releases, and alternatively, proposed that the Brunswick plant be shut down until the problems there could be solved. Because Petitioners could not authorize expenditures

for the Brunswick plant that, under the Government's theory, may have prevented the violations, Petitioners should not be found criminally liable for failing to make those expenditures.

The Eleventh Circuit's holding in *Hansen* places Petitioners, and other officers and directors in similar circumstances, in an untenable position that will likely chill qualified persons from taking or remaining in management positions in bankrupt corporations for fear of personal criminal liability. Moreover, because Hanlin's bankruptcy limited Petitioner's actual control over the operations of the Brunswick plant and its operations, not recognizing this reduction in control compounded the effects of the blanket RCO jury instruction.

CONCLUSION

This Court should grant this petition to correct the misapplication of Supreme Court precedent and resolve the split between the Eleventh Circuit and the other Circuit Courts of Appeals that have applied the RCO doctrine to environmental statutes. Further, this Court should grant this petition to address the tension between the environmental laws and the laws of bankruptcy. Accordingly, the Petitioners respectfully request that this Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED AUGUST 24, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-11638
D.C. Docket No. 98-00023-CR-2-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTIAN A. HANSEN, ALFRED R. TAYLOR, et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Georgia

(August 24, 2001)

Before BIRCH and DUBINA, Circuit Judges, and HANCOCK*, District Judge.

PER CURIAM:

Alfred R. Taylor, Christian A. Hansen, and Randall W. Hansen appeal their convictions for conspiracy to commit

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

environmental crimes, violating the Clean Water Act, violating the Resource Conservation and Recovery Act, and violating the Comprehensive Environmental Response, Compensation, and Liability Act. On appeal, they each assert several alleged trial and sentencing errors. Finding no merit to their claims, we AFFIRM.

I. BACKGROUND

Christian Hansen ("Hansen") founded the Hanlin Group ("Hanlin") in 1972, and served as its President, Chief Executive Officer, and Chairman of the Board until early April 1993. R19-160. Hanlin operated an industrial plant in Brunswick, Georgia, as LCP Chemicals-Georgia ("LCP"), R21-41, and Hansen served as the plant manager for approximately two months in 1993. R19-166-67. Randall Hansen ("Randall"), Hansen's son, was hired as an executive vice president in 1992. R21-193. He became Chief Executive Officer in April 1993 and served in that capacity until November 1993. R21-195. Alfred Taylor ("Taylor") began working for LCP in 1979, and became the Brunswick operations manager in 1991. R21-243-44. He served as plant manager from February until July 1993. R21-244-45.

Hanlin purchased the Brunswick plant in 1979.[1] R21-41. The plant, which is on a site adjacent to tidal marshes

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1. The site has been used by various companies for 50 years, and was unregulated by any environmental regulations until the 1970s. The site was operated as an oil refinery from 1919 to 1937 by Atlantic Richfield [ARCO], as a manufacturing site from 1937 to 1955 by Dixie Paint Company, and as a chlor-alkali facility from (Cont'd)

and Purvis Creek, operated continuously year-round, manufacturing caustic soda, hydrogen gas, hydrochloric acid, and chlor-alkali bleach. About 150 people worked at the plant in two "cell buildings" or "cellrooms." Each cellroom was about the size of a football field and contained fifty mercury "cells," the units used to produce the bleach, soda, gas, and acid ultimately sold by LCP. R8-200-2. "The production process generated hazardous wastes, including elemental mercury, mercury-contaminated sludge (or "muds"),[2]

(Cont'd)
1955 to 1979 by Allied Chemical. R16-85-86. Allied Chemical used graphite anodes impregnated with PCBs during the chlor-alkali process, and buried the contaminated anodes on the site. R21-54, 229. It is now a Superfund site, and is being cleaned at the expense of the government and these earlier owners.

2. In a memorandum regarding mercury consumption, dated 4 October 1993, Taylor noted that mercury "[c]onsumption was particularly high in 1988" and for 1990-1993. Govt. Ex. 19-5. An attachment showed "excess" mercury from consumption of 243, 102 pounds from 1986 to 1993. *Id.*

The "mud" was spread onto the cellroom floors to dry, the mercury was recovered from underneath and on top of the mud, and the mud was put into drums for disposal. R19-190-93. When the wastewater covered the floors, the mud could not be stored until the water receded and it was dried. *Id.* at 191. The drums were stored underneath the cellrooms. R20-62. The drums were labeled and dated when the mud was first put into the drum "because [the plant] only had a ninety-day storage period under [the] permit." *Id.* at 62-63. There were "times" when the mud was "redrumed" and again labeled for another ninety-days. *Id.* Hanson testified that Taylor was aware of the muds in the drums. *Id.* at 62.

(Cont'd)

wastewater, chlorine contaminated wastewater, and extremely caustic wastes with high pH values." *Id.* at 2-3; R16-112-14. The wastes were subject to various environmental regulations, including wastewater limitations on pH, mercury, and chlorine set forth in LCP's National Pollutant Discharge Elimination System ("NPDES"), and to regulations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d)(2).

LCP constructed a wastewater treatment system in 1989 and 1990, and was allowed, by NPDES permit, to discharge the treated wastewater into Purvis Creek. Although LCP represented that the system would have a continuous treatment capacity of 70 gallons per minute in the project description submitted to the Georgia EPD, Govt. Ex. 10-3b at SW5 00001807, the filtration and storage systems installed had a capacity of only 35 gallons per minute, R20-20-21; Govt. Ex. 1-12. LCP did not notify the Georgia EPD of the lower wastewater treatment capacity. R20-290. The plant was authorized to store wastewater which was awaiting treatment in the wastewater treatment plant on the floor of the cellrooms. R16-118; R21-145, 161. The cellrooms were constructed of concrete, with a downward slope which diverted the wastewaters to a sump[3] and then to the wastewater treatment holding tanks. R19-33-34. If the cellroom became incapable of holding the wastewater, it

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(Cont'd)

At Taylor's direction, mud that accumulated in the wastewater stored in tank railcars was "drained off to the wastewater treatment area." R20-356-57.

3. A sump is a hole with a grate over it. R19-34

leaked out onto the ground and accumulated in a lake. R16-131-32. LCP also used "Bunker C" oil tanks for additional wastewater storage. R19-291; R20-42-45. Due to accidental spills, bleach sometimes accumulated on the Cellroom 1 floor. R19-258. During the early 1990s, the maintenance at the plant began deteriorating. R20-177, 179. Replacement parts were not made available, and wastewater began accumulating around the plant. *Id.*

The operations were subject to Occupational Safety and Health Administration ("OSHA") regulations for the protection and safety of the employees. The workers exposed to mercury vapors in the mercury cell process were provided with liquids to drink in order to stay hydrated and deplete the mercury, and their exposure was periodically monitored through an extensive mercury urinalysis procedure. R20-145-46; R21-251-52. Employees who showed exposure to excess mercury were not allowed to return to work until they were seen by a medical physician, and were then relocated to other plant locations away from the mercury cells.[4] R20-146, 164-65, 168-69, 174; R21-255, 258; R22-12, 24.

In August 1992, OSHA inspected the plant "due to an employee complaint about safety hazards associated with water on cell room floors." Govt. Ex. 10-7i. OSHA found this to be a "willful violation and demanded that no employees be allowed to work in contact with the water while the equipment was energized," and "forced" LCP "to erect a

4. LCP retested and counseled any employee who tested above 150 micrograms per liter, and employees with a confirmed result above 250 micrograms were removed from further exposure until their level went below 150. R21-253-55.

boardwalk system above the water level around all the equipment until the water c[ould] be eliminated permanently." *Id.* LCP added wooden elevated walkways in the cellrooms to prevent the workers from having contact with the water on the floor and to reduce the workers' risk of electrical shock or chemical burns.[5] R16-118; R21-145-46, 161. The chemicals used in LCP's operations were very alkaline and caustic and could irritate and burn skin.[6] R16-93; R19-43, 197; R20-188; R21-263-64. To minimize the workers' risk of skin irritations and burns, LCP held routine safety meetings, encouraged and received safety inspections, and provided the employees with training, protective equipment to preclude skin contact, and first aid stations and

5. The water occasionally rose high enough to splash onto or soak the walkways, and they became slick. R20-181, 322. OSHA also required that LCP utilize a lockout procedure for employees to work on a cell or pump because of the potential electrical hazards. R19-45; R20-190. In the lockout procedure, an operator ensured that the electrical power was shut off before a mechanic was permitted to begin work. R19-46-47; R20-190, 323.

6. One former employee, Duane Lorenzo Carver, testified that he received second and third degree burns on his thighs from caustic that had soaked through his clothes. R19-182, 197. In reference to a question regarding the conditions of the cellrooms in 1993, he said that, while digging out the sump, he misstepped and fell into the sump hole, which was filled with wastewater, "about chest deep." R19-201-03, 227-228. Carver said that he showered immediately and suffered minor burns on his stomach and legs. R19-203, 229. Carver was unable to recall the exact date, and admitted the accident could have occurred any time between 1987 and 1993. R19-226. Carver testified that, although the employees were told to report all accidents to management, he did not report the accident, and thus did not receive any medical attention. R19-230.

showers to relieve inadvertent contact. R19-47, 194, 233-34, 246, 300-01; R20-170, 181-82, 185, 188, 190-91; R21-249. All employees, including those assigned to the cellrooms, were authorized to work elsewhere in the plant if they were concerned about their safety. R19-302; R20-186-87, 320-2; R21-156.

In 1991, LCP's parent corporation, Hanlin, filed a voluntary bankruptcy petition with pre-petition obligations exceeding $100 million. R19-119; R21-194. Shortly thereafter, Randall was hired as an executive vice president of LCP and charged with "developing the business and financial plans necessary to turn around the financial condition of the chemical business."[7] R21-193; R16-97. Randall worked closely with Hanlin's bankruptcy attorneys, the law firm of McCarter and English, and the environmental law firm of Decher, Price and Rhoads. R19-140-43; R21-194, 215.[8] Randall also worked closely with LCP's corporate environmental manager and site environmental managers. R20-64-65; R21-210, 215. During the bankruptcy proceedings, available funds for maintenance, repair, and environmental compliance were restricted. R19-50-52. Randall attempted to find additional funds by selling excess equipment and reducing the payroll but the funds remained limited. *Id.* The ultimate decision-making for all major projects, capital and extraordinary expenditures, and the sale of assets, were subject to the approval of the Board and the

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7. Randall Hansen had worked for Hanlin in a financial capacity from 1986 until 1989.

8. During the bankruptcy proceedings, Hanlin set aside seven to ten thousand dollars per day for professional fees. R19-147.

bankruptcy creditor's committee and court. R19-121, 143-47, 174-75; R21-196. Although funds were requested to address the cellrooms' wastewater problem, the funds were usually not released. R21-259-60.

In February 1992, the Brunswick plant manager, James L. Johns, advised Randall in writing that, without "extensive work," to keep the wastewater treatment system operable, they would be unable to "operate the plan for more than a few days without 'willfully' violating EPD regulations which we will not do." Govt. Ex. 1-8a at HA 00024857.[9] In April 1992, Randall visited the Brunswick plant and met with plant manager James L. Johns for "an update on regulatory compliance requirements." Govt. Ex. 10-7b. He indicated that he would provide guidance on the approval of funds for a study for the NPDES permit, LCP's commitment regarding the 1 June 1992 Georgia EPD deadline for cellroom floor repairs, and the possibility of a study or remediation plan for the "brine impoundments." *Id.* In June 1992, Randall was advised in writing that a conference with OSHA on 8 May 1992 noted 26 serious violations and 11 non-serious violations. Govt. Ex. 10-7d.

During the summer of 1992, the Brunswick plant management changed.[10] R16-104-05. In August 1992, Taylor

9. The memo was addressed "Production Reliability" and noted that "[l]ack of money has limited the plant production capability and imposed substantial risk on maintaining acceptable production levels." Govt. Ex. 1-8a at HA 00024856. The wastewater treatment issues were one of nine noted problems. *Id.*, HA 00024856 and 57.

10. J.L. Johns, the plant manager at the beginning of 1992, retired due to heart problems. R16-104. During the six month search

(Cont'd)

advised Randall that Brunswick was "unable to meet current permit limitations," that he anticipated "more restrictive" limitations, and that the "[p]erformance of the waste water treatment system [was] a serious threat to the continued operation of the plant." Govt. Ex. 1-12. Taylor said that while the "generation of waste water ha[d] greatly increased due to leaking brine tanks, [poor condition of the] brine pumps [and] . . . brine filters, heavy rainfall, the necessity to destroy bleach, and numerous operating problems," at the same time the capacity of the wastewater system was limited by the reduced capacity of the filtration and storage systems, was "further reduced" by the "[l]ack of maintenance," and the system was "frequently shut down due to mechanical problems and operator errors." *Id.* In November 1992, Randall visited the Brunswick plant to interview a candidate for plant manager, and spoke with the acting manager, Hugh Croom. R19-30. At that time, Croom advised Randall of problems with the caustic filters and the intentional dumping of caustic on the cellroom floors by some unknown employee. R19-30-31, 56-58. Croom testified that Randall "was just as concerned as we were about the problems" and authorized Croom to hire a task force.[11] R19-50, 58.

(Cont'd)
to replace Johns, Hugh Croom, the plant manager for the LCP chlor-alkali plant in North Carolina, transferred to Brunswick and acted as plant manager. *Id.* at 103-05. Croom returned to the North Carolina plant in January 1993, and admitted that problems with the wastewater treatment plant and his concerns for maintaining a production rate and for the safety of the employees and the community contributed to his desire to leave Brunswick. R16-134-36.

11. The dumping abated once the task force was hired and the valve area was monitored. R19-58.

Appendix A

In February 1993, LCP offered the plant manager job to Taylor. R21-244. During his tenure as manager, Taylor stressed safety and strict adherence with LCP's training and safety programs, and assured employees the right to refuse to perform any activity if the employee felt it to be unsafe. R19-302-03. When the wastewater overran the cellroom berms and streamed outside the building, the overflow was reported to the EPD and to the LCP Board by letters signed by Taylor. R20-25-27. The amounts reported in the letters were consistent with the data that the plant had at that time. R20-27.

During the spring of 1993, Taylor attended a company meeting with Randall and Croom in which they discussed the condition of the Brunswick plant and possible solutions. R19-18-19. Taylor and Croom recommended "either s[illegible]ing the plant down or shutting it down long enough [illegible]salvage one cellroom and rebuild the second cellroom, and then starting back up with just one cellroom." R19-20, 22. Taylor worked up "the figures and costs" and submitted it to Randall, but Randall later advised them that "[t]hey won't let me do it." R19-22-23, 64. By letters to EPD, Taylor reported that the plant had exceeded the maximum daily allowable discharges seventeen times, and explained that the discharges were due to "heavy rainfall," "miscommunication between operations supervision," "a slight miscalculation," and "storm, rainfall and process leaks." Govt. Ex. 10-1d, e.g. Taylor noted that the "waste water treatment operating efficiency and outfall discharge" was "positive[ly] affect [ed]" by LCP's decision not to replace a leaking brine tank. Govt. Ex. 10-1g.

Appendix A

In April 1993, the Board of Directors, with the approval of the bankruptcy court, removed Hansen as Chairman, President, and CEO of Hanlin after he attempted to expel the outside directors from the board. R19-122-23, 160, 167-68. The Board and the bankruptcy creditors' committee asked Randall to serve as LCP's interim CEO and Chief Operating Officer [COO]. R19-160; R21-195, 200. His primary focus was financial and, with the support of the bankruptcy creditors committee and court, he sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions. R19-147-48, 164, 174-75; R21-200-01, 219. In this capacity, Randall received daily reports concerning the Brunswick plant's operations and problems. R16-97-98. After Hansen's removal as CEO, he was no longer a corporate officer and became a director and employee. R19-136, 160, 168. Sometime later, the Board sent Hansen to Brunswick to help run the plant. R19-166-67.

Taylor reported five discharge violations in April, and indicated that two violations were due to a problem in the wastewater treatment system that had been corrected, one violation was attributable to rainfall, and one violation was due to leaks which had been repaired. Govt. Ex. 10-1h. Taylor indicated that "[a]n upset in the wastewater treatment system caused a release of ineffectively treated wastewater" but that "the discharge was rerouted until the system resumed normal operation." *Id.* Taylor reported 16 discharge deviations in May 1993, which he indicated were caused by an equipment failure which had been repaired, "overloading the wastewater treatment system," and rainfall. Govt. Ex. 10-1i. In June, Taylor reported 21 excessive discharges which were

attributable to "upsets" and "operational problems" in the wastewater treatment system and equipment failures. Govt. Ex. 10-1j and 10-1k. Hansen visited the plant in late June and began working with Taylor. R19-167.

In July 1993, Taylor resigned as plant manager. R21-245. Upon Taylor's resignation, Hansen assumed the running of the plant and served as plant manager from July through September 1993. R19-24, 167; R20-354. Taylor subsequently returned to the plant as a full time employee as a process or project engineer on the condition that he not have to "assume managerial type duties." R21-246. He remained involved in environmental issues, however, and in October 1993, questioned the assistant production manager regarding the loss of mercury. R20-325, 337-38.

The Georgia Environmental Protection Division notified LCP in writing in June 1993 that it proposed revoking the NPDES permit to discharge treated wastewater in Purvis Creek based on "continuous violations . . . since May 1992 of pH, total residual chlorine, and mercury." Govt. Ex. 13-1d at 1. It explained that, although it had provided LCP "Notice of Violation" letters twice in 1992 and had requested that LCP "take all necessary measures to come into compliance," "these violations have continued" and "significant noncompliance" was documented in 10 out of 13 months from May 1992 through May 1993. *Id.* The notification summarized that there had been "no progress . . . in upgrading the plant or its operation" since the noncompliance had begun to be a serious problem. *Id.* at 2; R20-274-276. Randall submitted formal written comments on the revocation stating that "LCP has already taken steps

to improve the situation by installing additional filter capacity, repairing or replacing equipment and reducing the load on the system" and referring to a 23 July plan addressing future corrective measures. Govt. Ex. 10-6 at 4.

In July and August 1993, Hansen directed the plant employees to begin pumping the wastes into the large "bunker" tanks that had once been used to store oil although he knew that the wastewater mixed with oil could not be run through the wastewater treatment system, R20-48, 183, 328-29, 350. The plant environmental/safety manager reported the use of the tanks to Randall in July. Govt. Ex. 10-7x. After the EPD moved to revoke the plant's permit, Hansen advised the employees to "increase the flow on the wastewater treatment system to a level that was to keep the water from running out the [cellroom] door" and into the lake. R20-358-59. During their respective terms as plant manager, Hansen and Taylor were advised of and observed "water [ ] flow[ing] out the back door of the cellroom" as a result of a break in the cellroom berms, and "overflow[ing] on the ground." R20-327-28, 335-36, 341. The employees complained to Hansen, Taylor, and Randall about "the water condition, the deterioration of the plant with the pipes, the leaks, and the safety equipment," and, despite assurances that conditions would improve "[a]s soon as [the plant] g[o]t some money," the plant did not get "any money" and conditions did not change. R21-146-50.

The NPDES permit was revoked on 23 September 1993. R20-275. LCP filed an appeal which stayed the revocation.

R20-275. Although EPD sought a temporary restraining order, it was denied by the state court judge.[12] R20-302-03.

During this same period of time, Allied Signal and HoltraChem indicated interest as buyers, and a financial agreement was worked out in which Allied Signal would provide needed money, personnel, and raw materials or maintenance parts for the plant, including an extra wastewater treatment facility. R9-228, Exs. A & B; R19-149-51; R20-18, 80. As a part of the financial agreement, Allied Signal loaned employee Mark White to LCP to serve as plant manager in October 1993.[13] R19-152-53; R20-18. With the influx of Allied Signal's resources, conditions at the plant improved. R20-80. The purchase agreement eventually fell through and shortly thereafter the facility closed. After the plant closed, Randall, through the bankruptcy counsel, requested $1,500,000 in additional funds from the bankruptcy court to deal with the environmental impact of closing but the request was denied. R9-228, Ex. C at 2, 7, Feb. 8, 1994, letter from M. Patrick M. Nuciarone.

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12. By letter, the bankruptcy creditors' committee advised the state judge of the bankruptcy proceedings and "the likely consequences that would result from any closing of the Brunswick plant." R9-228, Ex. B at 1. The committee represented that "even if actual production at [the plant] was to cease, Hanlin would have an obligation to continue to spend considerable amounts of money at [the] plant in order to avoid the possibility of an environmental catastrophe." *Id.* at 2. A possible environmental impact of shutting the plant down included "additional mercury leakage." R20-147; R19-83-84.

13. White continued at the plant as manager until the plant closed. R20-18.

The Georgia EPD turned the closed plant over to the U.S. Environmental Protection Agency (EPA) for cleanup and EPA estimated that the cleanup will cost more than $50 million. R20-380; R21-57. Taylor, as one of the ten LCP employees approved by the EPA to participate in the site cleanup, assisted in the decommissioning of the cellrooms and ran the water treatment plant built by the EPA. R21-55-56. The cleanup was paid for by the government and Hanlin's predecessors at the site: Allied Signal (successor to Allied Chemical), ARCO, and Georgia-Power Company. R21-39-40.

The government indicted Christian Hansen, Randall Hansen, Douglas Brent Hanson, and Alfred R. Taylor for conspiracy to commit environmental crimes at the site between 1 July 1985, and 1 February 1994, 18 U.S.C. § 371, (Count 1), and various substantive crimes.[14] R1-1-1. The charges included: violating the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A) and 18 U.S.C. § 2, by exceeding the NPDES permit between June 1993 and January 1994 (Counts 2-21); violating the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6928(d)(2)(A) and (e), and 18 U.S.C. § 2, by storing wastewater on the cellroom floor and permitting some to escape into the environment between 29 May 1993 and 1 February 1994 (Counts 22-32), storing wastewater in the Bunker "C" tanks between 23 July 1993 and 1 February 1994 (Count 33), and knowingly endangering employees by exposing them to impermissibly stored wastes and wastewaters between 29 May 1993 and

14. Two other plant employees, Duane Outhwaite and Christopher Dunn, were charged separately and entered into plea agreements. R8-200-7 n. 5.

1 February 1994 (Count 34); violating the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9603(b)(3), by failing to notify the U.S. government of unpermitted releases of chlorine or wastewater into the environment between 21 July and 23 October 1993 (Counts 35-41); and violating the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), 1538(g), and 1540(b)(1), by taking an endangered species, a Wood Stork, as a result of discharging mercury into the marsh, Purvis Creek, and the Turtle River (Count 42). R1-1. Hansen was charged with Counts 1-42, Randall was charged with Counts 1-34 and 42, Hansen was charged with Counts 1-6, 10-22, 24, 26-32, and 34-42, and Taylor was charged with Counts 1-32, and 34-42. *Id.* Hanson, the former environmental and health and safety LCP manager, pled guilty to a CERCLA offense (Count 41) and the offense under the Endangered Species Act (Count 42) and testified against Hansen, Randall, and Taylor.[15] R3-83; R20-6. At the conclusion of the defendants' case, the district judge granted their motion for acquittal as to Count 42 but denied the motion as to all other charges. R6-123. Hansen was convicted of all counts, Randall was convicted of all charged counts, and Taylor was convicted of Counts 1-3, 10-11, 22-26, 29-32, 34-35, and 38-41. R22-214-15. Their renewed motions for acquittal and motions for judgment notwithstanding the verdict and/or for a new trial were denied. R7-145, 146, 153-54, 163; R8-200.

Hansen was sentenced to 108 months of imprisonment, a fine of $20,000, a special assessment of $2,050, and two

15. Hanson was sentenced to eighteen months of imprisonment, and one year of supervised release on each count, concurrent. R8-123.

years of supervised release. R8-214. Randall was sentenced to 46 months of imprisonment, a fine of $20,000, a special assessment of $1,700, and two years of supervised release. R9-236. Taylor was sentenced to 78 months of imprisonment, a special assessment of $1,000, and two years of supervised release. R8-215. Each defendant appealed, and was allowed to remain on bond pending appeal. R8-219, 221; R19-226, 238-40.

On appeal, Hansen raises four issues: (1) the district court erred in admitting the government's expert witness testimony; (2) the district court's instructions misstated the reasonable doubt standard, improperly applied the concept of reasonable corporate officer, improperly defined the elements of knowing endangerment, and effectively eliminated the mens rea requirement from each statutory violation; (3) the evidence was insufficient to support his convictions; and (4) the district court erred in concluding that it lacked the authority to depart from the applicable sentencing guidelines. Randall argues that: (1) district court erred by not granting his motion for judgment of acquittal because the evidence was insufficient to support his conviction for knowing endangerment under the RCRA and the government never proved causation on counts 2-33; (2) the district court's instructions were erroneous on the elements of the charged substantive offenses and on the responsible corporate officer instruction as an alternative basis for criminal liability; (3) the district court erroneously admitted high prejudicially and irrelevant evidence; and (4) the district court erred by declining to depart downward. Taylor maintains that the district court erred: (1) by not granting his motion for judgment of acquittal and for a new trial based on

insufficiency of the evidence; (2) in its instruction concerning the wastewater treatment system; and (3) in sentencing him.

II. DISCUSSION

A. Admission of Expert Witness Testimony

Hansen argues that the district court erred in admitting testimony from government expert witness Daniel Teitelbaum because the government failed to disclose Teitelbaum's checkered history of credibility and the court failed to conduct a hearing regarding the testimony. Hansen also maintains that the district court erred in admitting the testimony of Teitelbaum and government expert witness Christopher Reh because the testimony was unreliable, irrelevant, and highly prejudicial. The government responds that Hansen waived the arguments regarding Teitelbaum's testimony by failing to object to the testimony at trial.

The week before trial, Hansen moved for a *Daubert*[16] hearing and to exclude the testimony of expert witnesses regarding certain allegedly scientific conclusions and exhibits. R4-94-95; R6-110-1. Noting that the motion was directed to the expert testimony regarding the effect of high mercury levels on endangered species as charged in Count 42, the district court denied it, finding that the motion did

16. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). In *Daubert*, the Court held that, when "[f]aced with a proffer of expert scientific testimony, . . . the trial judge must determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592, 113 S. Ct. at 2796.

"not identif[y] the source, the substance, or most importantly the underlying methodology of this testimony" and that, therefore, there was "no underlying methodology or reasoning for the court to assess." R6-110-1-2, 4.

During the trial, Teitelbaum confirmed that he had previously testified as an expert witness, and explained that "it has been a regular portion of [his] practice over the years."[17] R20-230-31. Hansen neither objected nor examined Teitelbaum after the government moved to tender Teitelbaum as an expert, and the court directed that the jury consider him an expert in his field. *Id.* at 232.

Teitelbaum testified regarding the plant employees' potential exposure to hazardous substances. Based on his review of "the large number of biological samples," "many interviews," the "documents concerning the health and hygiene program," and other documents, he found "a substantial amount of spillage of sodium hydroxide," "numerous chlorine leaks," and spills and leaks of hydrochloric acid at the plant. R20-233-35; *see also* 248-49. He noted that, because the sodium hydroxide spillage had a very high pH and was quite caustic, contact with the spillage could cause a first-to third-degree burn, or even be lethal.

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17. On cross-examination, Teitelbaum stated that this was the first time that he had testified as "a consultant for the U.S. Attorney," but explained that he had testified "for OSHA many times," "for the Department of Justice a number of times," and for "the EPA." R20-255-56. He was asked whether he considered the government to be a "pretty good customer" for his services, and responded that he did not "take any money from the government" for consulting services. *Id.* at 256.

Id. at 233-34. Teitelbaum explained that exposure to the chlorine leaks could cause "severe injuries to eyes, upper airways, and lungs, and, under some circumstances, death." *Id.* at 234. He commented that hydrochloric acid was a "classic poison" which would also cause burns and potential death. *Id.* at 234-35. Based on the biological samples, he concluded that the employees were "in danger of death or serious bodily injury." *Id.* at 244-45, 248. Finally, Teitelbaum noted that the data showed the mercury levels in the workers' urine were "between two and five times the acceptable level of excretion, based on the World Health Organization or the NIOSH recommendations." *Id.* at 244-45. No objections were raised to his testimony. *Id.* at 232-63.

At sentencing, the probation officer noted that he had "discredit[ed]" one of Hansen's witnesses "because he was not even at the LCP Plant" and "did not have firsthand knowledge to see this." R13-26. Hansen's attorney responded that, based on the probation officer's theory, Teitelbaum's testimony should also be discounted "because he never went to the plant before it was shut down." *Id.* at 28. The district judge commented that Teitelbaum "made a very credible witness. I think the best witness that the Government had." *Id.* at 29.

We review for abuse of discretion both the district court's decisions regarding the admission of expert testimony and reliability of an expert, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 1176 (1999), and the denial of a *Daubert* hearing, *United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir. 1999). "Absent an objection, we can review the challenged evidence only for plain error."

Appendix A

Christopher v. Cutter Labs., 53 F.3d 1184, 1192 (11th Cir. 1995).

Scientific expert testimony is admissible if "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). In *Daubert*, the Supreme Court suggested a flexible inquiry regarding the methodology considering such factors as "whether it can be (and has been) tested," whether it "has been subjected to peer review and publication," the "known or potential rate of error," "the existence and maintenance of standards controlling the technique's operation, and the degree it is accepted as reliable within the relevant scientific community." 509 U.S. at 591, 593-94, 113 S. Ct. at 2795-96. *Daubert* hearings are not required, but may be helpful in "complicated cases involving multiple expert witnesses." *City of Tuscaloosa*, 158 F.3d at 564-65 n. 21. A district court should conduct a *Daubert* inquiry when the opposing party's motion for a hearing is supported by "conflicting medical literature and expert testimony." *Tanner v. Westbrook*, 174 F.3d 542, 546 (5th Cir. 1999). Consistent with *Daubert*, the evidence must be scientifically related to the disputed facts at issue in the case. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999).

Appendix A

Hansen's motion for a *Daubert* hearing was neither addressed to the charges to which Teitelbaum testified, or his testimony in general, nor supported by the source, substance, or methodology of the challenged testimony. Hansen failed to object to either Teitelbaum's qualification as an expert or his testimony during trial. Teitelbaum's testimony was based on his review of biological samples, interviews, and documents, and assisted the trier of fact in understanding the potential injuries that could result from the conditions at the plant. The district judge did not abuse his discretion by denying the motion or by admitting the testimony.

To the extent that Hansen raises a *Brady*[18] claim that the government suppressed exculpatory or impeachment evidence by failing to disclose Teitelbaum's "checkered" past, we find that it is without basis. In order to state such a claim, a defendant must show (1) "that the government possessed evidence favorable to the defendant (including impeachment evidence) . . . ; (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence . . . ; (3) that the prosecution suppressed the favorable evidence . . . ; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *United States v. Meros*, 866 F.2d 1304, 1308 (11th Cir. 1989) (per curiam). In this case, the evidence which Hansen alleges

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18. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) ("The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

the government failed to disclose consists of court opinions either disregarding or discrediting Teitelbaum's testimony. Although Hansen argues that the government knew of this discredited testimony based on Teitelbaum's previous testimony for the government, Hansen fails to show that the government was in actual possession of the information or actually suppressed it. Further, the information was available to Hansen through reasonable diligence both before and during the trial.[19] The cases were all available through legal research and information on them could have been, but was not, addressed during Teitelbaum's testimony. Finally, the cases relied on by Hansen all relate to Teitelbaum's testimony in tort actions as to causation of a specific injury. They do

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19. Hansen argues that Teitelbaum's testimony was "discredited" in four cases: *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512 (1997), *Sweger v. Texaco, Inc.*, Nos. 88-1781, 88-1834 and 88-2745, 1991 WL 35345 (10th Cir. Feb. 22, 1991); *Land v. United States*, 35 Fed. Cl. 345 (1996), and *National Bank of Commerce v. Associated Milk Producers, Inc.*, 22 F. Supp. 2d 942 (E.D. Ark. 1998). In *General Elec. Co.*, the Court found that the district court did not abuse its discretion in excluding the testimony of Teitelbaum (and other expert witnesses) because the studies on which he relied were not sufficient to support his conclusion. 522 U.S. at 146-47, 118 S. Ct. at 519. In *Sweger*, the court found that Teitelbaum's testimony did not provide the necessary certainty to establish causation. *Sweger*, slip op. at 1, 5-6. In *Land*, Teitelbaum appeared as the plaintiffs' medical expert. 35 Fed. Cl. at 352 n. 7. The hearing officer found Teitelbuam's " 'preliminary' medical opinion" regarding the cause of the plaintiffs' injuries to be "of little value because Dr. Teitelbaum did not conduct physical examinations of the plaintiffs." *Id.* In *National Bank of Commerce*, the court found that Teitelbaum's view of the causation of the plaintiff's cancer was "undercut by the inadequacy of . . . reliable scientific proof of causation." 22 F. Supp. at 967.

not, therefore, have probative value as to his testimony regarding potential health effects of the chemicals or the employees' risk of death or serious injury after exposure to these chemicals. Hansen is unable to show a reasonable probability that the information would have changed the outcome of the proceedings.

Christopher Reh, an employee of the National Institute for Occupational Safety and Health ("NIOSH"), also testified for the government. R20-192. The district judge qualified him as an expert in the field of industrial hygiene.[20] *Id.* at 194. Reh explained that he was assigned to the Brunswick plant as the project officer after NIOSH received "a valid request for a health hazard evaluation" from one of the plant's unions in 1987.[21] *Id.* at 196. He said that, during the initial site visit, he and his team met with Taylor, a plant engineer, and a few union representatives to discuss the request.[22] *Id.* at 196-98. They visited the plant, and observed "mercury in many places on the cellroom floor in cracks or crevices," and passively monitored mercury exposure in the workers' "breathing zone." *Id.* at 198-99. They found that the plant was not using the creatnine monitoring scale, but was

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20. Neither Hansen nor his codefendants questioned Reh regarding his background or his area of expertise and raised no objections to Reh's qualification. R20-194.

21. Reh indicated that they were requested to evaluate the health hazards associated with mercury, chlorine, and hydrochloric acid. R20-199, 203; Govt. Ex. 40-1b.

22. The NIOSH team consisted of Reh, a medical doctor, and another industrial hygienist. R20-198.

reporting mercury levels by "micrograms per liter." *Id.* at 204. The monitors found that mercury exposure exceeded the NIOSH and OSHA recommended levels.[23] Taylor's objection to further testimony from Reh on the grounds of relevance was overruled. *Id.* at 201. Reh and his team advised Taylor of their findings by letter and recommended use of creatnine correction urine mercury monitoring which would indicate the amount of mercury per gram of creatnine. *Id.* at 201-03; Govt. Ex. 40-1b. From the results of the first visit, the team made a second visit to conduct a more in-depth study in 1988. R20-202. During the second visit, the team used an active sampling method to determine 28 workers' breathing zone exposure levels, collected urine samples from 58 workers, and administered questionnaires to and conducted physical examinations of 65 workers. *Id.* at 205-07. Taylor was provided with a written interim report in 1988 and a final report in 1991, both of which showed that workers had mercury levels above recommended standards.[24] *Id.* at 207-08, 210, 214; Govt. Exs. 40-1c and 1d.

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23. Reh explained that the NIOSH recommended exposure levels ("REL") were 50 micrograms of mercury per cubic meter of air and that the OSHA permissible exposure levels ("PEL") are 100 micrograms of mercury per cubic meter of air. R20-200. He said that all of the sixteen monitored workers showed RELs above 50, and eleven of the monitored workers had levels above the PEL. *Id.* at 200-01.

24. Reh reported that they found that 29 of the tested 58 workers had urine mercury levels which exceeded the World Health Organization recommended standard of 50. R20-208, 210. The average level was 136 micrograms per gram of creatinine, with a range from 2 to 689. *Id.* at 210.

The government offered Reh's testimony to show that the workers were placed "in imminent danger of death or serious bodily injury" and that Hansen, Randall, and Taylor were aware of the workers' exposure to hazardous substances. This testimony supports both of those propositions. The district court did not abuse its discretion by admitting the testimony of Reh.

B. *Insufficiency of the Evidence*

We review the denial of a motion for a new trial for abuse of discretion, and the denial of a motion for judgment of acquittal *de novo*. *United States v. Pistone*, 177 F.3d 957, 958 (11th Cir. 1999) (per curiam). To uphold the denial of a motion for judgment of acquittal, we "need only determine that a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." *Id.* When considering the sufficiency of the evidence, we "view the facts and draw all reasonable inferences therefrom in the light most favorable to the government." *United States v. Slocum*, 708 F.2d 587, 594 (11th Cir. 1983).

1. Position of authority

"To prove aiding and abetting, the government must demonstrate that a substantive offense was committed, that the defendant associated himself with the criminal venture, and that he committed some act which furthered the crime." *United States v. Hamblin*, 911 F.2d 551, 557 (11th Cir. 1990). "[T]he government must show that the defendant shared the same unlawful intent as the actual perpetrator" but does not need to prove that "the defendant was present at the scene

when the crime occurred, or that he was an active participant." *Id.* at 557-58; *United States v. Pepe*, 747 F.2d 632, 665 (11th Cir. 1984) ("aider and abettor . . . need not even be present"). "Encouraging" a violation and "discouraging" the reporting of the violation, *United States v. Sinskey*, 119 F.3d 712, 718 (8th Cir. 1997), and "personally attempting to avoid [a violation's] detection by the [RCRA] inspectors," *United States v. Self*, 2 F.3d 1071, 1089 (10th Cir. 1993), have been held sufficient to show that a defendant aided and abetted the commission of a crime.

The indictment alleged that the defendants, "after learning that the Brunswick facility was disposing of hazardous wastes . . . without a RCRA permit, continued to operate the Brunswick facility in such a manner as to continue the disposal of these hazardous wastes without expending adequate funds . . . to prevent the disposal of such hazardous wastes into the environment." R1-1-11. The jury was instructed that the defendants were responsible for the acts of others that they "wilfully directed," "authorized," or aided and abetted by "willfully joining together with [another] person in the commission of a crime." R22-181. The district court denied Taylor's motion to acquit or for a new trial on these charges finding that "the Defendants worked for LCP in positions of responsibility and authority while . . . the violations took place." R8-200-23.

a. Hansen

Hansen maintains that the evidence failed to show that he was in a position of authority after he was deposed as CEO in April 1993 until he began serving as plant manager

on 16 July 1993, and after he was officially replaced as plant manager by Allied employee Mark White on 18 October 1993. Therefore, he contends that the district court erred in not granting his motion for judgment of acquittal as to the 18 counts that occurred after 18 October 1993 (Counts 6-9, 14-15, 19-21, 23, 25, 29, 30-32, 38-40), the two counts that occurred between April and July 1993 (Counts 2 and 10), and the count that arose on 22 October 1993 (Count 33).

The testimony at trial indicated that Hansen was aware that wastewater was permitted to flow out the cellroom back door in June 1993,[25] and directed the use of the old Bunker C storage tanks for storage of wastewater, including the inadequately treated wastewater from the treatment system, from July through September 1993.[26] Although the acts continued after Hansen left his decision-making position, the acts occurred at his direction. This evidence was sufficient for the jury to reasonably conclude beyond a reasonable doubt that his acts were in furtherance of the violations. The district court did not err in denying Hansen's motion for judgment of acquittal or motion for new trial.

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25. Testimony of LCP former assistant production manager James Dunn, R20-327-28, 341.

26. Testimony of former LCP health and safety manager Douglas Brent Hanson, R20-48-49, LCP maintenance handler and expeditor George Mower, R20-183, and LCP former production manager Duane Outhwaite, R20-350. Outhwaite testified that the storage tanks were used for wastewater overflow to keep the inadequately treated wastewater from "running out the door" and to help prevent the deep pools of wastewater from forming on the cellroom floors. R20-350, 358.

b. Randall

Randall claims that the government presented no evidence that he personally treated, stored, or disposed of a hazardous waste, personally effected a CWA violation, or instructed an agent to do so. He maintains that, under the laws of bankruptcy and corporate governance, he lacked the authority to close the plant or to allocate the funds for the needed capital improvements. He contends that LCP needed the bankruptcy court's approval to use the bankruptcy estate's assets, or to obtain a new debt, to perform the needed repairs at the Brunswick plant.

In February 1994, LCP applied to the bankruptcy court for the funds "to shutdown" the plant and for new equipment, but the motion was denied. Def. Randall Ex. 1, Amended Notice of Motion at 5; R9-228, Ex. C and 8 Feb letter. Hanlin Board of Directors member James Mathis testified that Randall was responsible for "run[ning] the day-to-day operations of the company" once he became the interim CEO and COO. R19-160. He said that the Board was "very interested in whether the environmental problems-whether we were in a position of compliance with the environmental regulations. But the information that we had indicated that, really, compliance was not a problem." *Id.* at 164. He explained that, as a result of the weekly reports on the plant's operations, the Board believed that "there were really no excursions of any significance going on". *Id.* at 165.[27] Mathis

27. Mathis testified that there were places on the report forms for the "number of excursions" or environmental noncompliances which "were filled in with 'zeros' each time." R19-165. He said that they later learned that the zeros were clerical errors. *Id.*

said that Randall "had the primary responsibility" for providing information regarding the environmental compliance issues to the Board and that Hansen fed "information to Randall in that regard." *Id.* at 166. He agreed that the decision to sell the plant would have been a board decision requiring the approval of the bankruptcy court. *Id.* at 174-75.

LCP, as a debtor in possession, could "use the property of the estate in the ordinary course of business," but needed court approval to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(c)(1) and (b)(1). It could "obtain unsecured credit . . . in the ordinary course of business," but needed court approval "to obtain unsecured credit or to incur unsecured debt other than" "in the ordinary course of business." *Id.* at 364(a) and (b). Bankruptcy does not insulate a debtor from environmental regulatory statutes. In reviewing an injunction to clean up a hazardous waste site, the Supreme Court commented:

> [W]e do not suggest that [the debtor's] discharge [in bankruptcy] will shield him from prosecution for having violated the environmental laws . . . or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. . . . [W]e do not hold that the injunction . . . against any conduct that will contribute to the pollution of the site or the State's wasters is dischargeable in bankruptcy . . . Finally, we do not question that anyone in possession of the site . . . must comply with the environmental

> laws . . . . Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.

Ohio v. Kovacs, 469 U.S. 274, 284-85, 105 S. Ct. 705, 710-11 (1985). *See also Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494, 507, 106 S. Ct. 755, 762 (1986) (A bankrupt debtor in possession "may not abandon property in contravention of a . . . regulation that is reasonably designed to protect the public health or safety from identified hazards.").

Although Randall claims that his role as Executive Vice-President and acting CEO was limited to financial matters, he also received daily reports about the plant's operations and environmental problems, R16-97-98, R21, 359, wrote and received memos regarding specific plant operational problems, Govt. Ex. 104, 1-6f, 1-8a, 1-12, received monthly written environmental reports, Govt. Ex. 10-1o-10-1nn, 10-7c-7d, 10-7f, and oral environmental reports, R21-64, 359. He admitted that Hanlin's bankruptcy was not an excuse for violating environmental laws. R21-219-21. There is no indication that he asked the Hanlin Board or the bankruptcy court to close the plant. The evidence indicates that he apparently misled them into believing that environmental compliance was not a problem. After the Georgia EPD attempted to revoke the plant's NPDES permit in June 1993, Randall contested the revocation, explaining that the plant's CWA violations were due to a lightning strike and equipment failures, and asserted that "LCP has already taken steps to improve the situation." Govt. Ex. 10-6. This evidence was

sufficient for the jury to conclude that Randall actions were in furtherance of the violations.

c. Taylor

Taylor argues that he should not be held responsible for the environmental violations that occurred after he resigned as plant manager, specifically counts 2-3, 25, 29-32, 38-41. Taylor resigned as plant manager on 16 July 1993, R21-245, but returned shortly thereafter as a project engineer and continued in that position until the plant closed, R21-246-47, 317-18. As project engineer, Taylor was directly involved in responding to the plant's environmental and safety problems and, at Hansen's request, developed a list of short-term solutions to the problems with estimated costs. R20-338; R21-247-48. Taylor's proposed solutions were subsequently funded. R21-247-48.

Although Taylor left his managerial position, he continued to work in a position in which he directed or authorized acts of the employees on environmental and safety problems.[28] Testimony at trial indicated that, in October 1993,

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28. Despite Taylor's resignation as plant manager and his re-employment as project engineer, he was considered to be in a management position. See R20-152 (D. Brent Hanson testified that Taylor was his immediate supervisor both before and after his resignation and re-employment); id at 335 (Dunn testified that Taylor "probably would have been plant manager" in late 1993), 337 (Dunn said that in "October of '93 I would assume [Taylor] was plant manager."); *id.* at 312, Govt. Ex. 13-4 (19 January 1994 letter from Georgia EPD acting unit coordinator Susan Eason to "Plant Manager"

(Cont'd)

Taylor was aware of the wastewater overflow from the cellrooms, the excess loss of mercury, and the use of the tank cars for wastewater storage, and that he supervised the release of the overflow.[29] This evidence was sufficient for the jury to conclude beyond a reasonable doubt that these acts were in furtherance of the violations. The district court did not err in denying his motion for a new trial.

2. Hazardous substances or materials

Taylor and Hansen argue that the government failed to prove that the untreated wastewater contained enough

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Taylor in which she referenced Taylor's explanation for "NPDES excursions" at a 6 December 1993 meeting). *But see* Govt. Exs. 13-2ff, gg, hh, ii, and jj (letters from Mark S. White, as "Plant Manager," to EPD dated October-February 1994).

29. Testimony of James Dunn. R20-335-39. Taylor directed a memorandum addressing the mercury losses and suggesting a solution to LCP employee Chris Dunn on 4 October 1993. Govt. Ex. 19-5. Dunn responded "yes" when asked whether Taylor was aware of the overflow release from the backdoor of the cellroom. R20-327-28. Dunn testified that Taylor observed the overflow "on the ground." *Id.* at 336. Dunn said that he told Taylor he was having trouble pumping the waste into the tank cars and that mercury loss was due to "leaks coming out of the products or it was tied up in hazardous waste muds." R20-337, 339. By memorandum, Taylor proposed a flow plan for the projected waste streams of "19 to 125 gallons per minute" when the wastewater treatment system was only working at a 40 gallon per minute capacity. *Id.* at 340; Govt Ex. 19-4a. Wilbur Outhwaite testified that Taylor advised that the employees needed to empty the wastewater from the tank cars. R20-356.

mercury and caustic to meet the environmental laws' definition of hazardous substances or materials, or that the untreated wastewater was improperly stored.

a. Hazardous substances as defined

OSHA chemist Clinton Leroy Merrell testified that samples which were submitted from LCP on 9 September 1992 tested as containing 8 to 30 parts per million of mercury, and six to ten-percent caustic, with a pH of 14. R21-163, 165-67; Govt Exs. 45-6, 45-9. Former LCP plant manager Hugh Leroy Croom testified that, in January 1993, the untreated wastewater may have had "a high pH, and . . . some mercury," but would not have contained mercury sludge. R16-91, 131-32. He said that the pH could be high enough to be a danger "at times" but that it did not stay high and varied according to the spills. *Id.* at 132; R19-35-36. However, he testified that muds containing mercury and caustic were washed onto the cellroom floors every three or four days when the treatment system's filters were back washed. R16-127-28; R19-103. When asked whether the wastewater on the cellroom floors would be considered a hazardous waste, Croom responded "[m]ost of the time, probably it was." R16-112-13; *see also id.* at 128 (Croom admitted that wastes on the cellroom floor were listed as hazardous wastes).

Dr. Teitelbaum testified that a fall and submersion into caustic soda with a pH of 14 would cause a third-degree burn over the entire body with a likelihood of death. R20-241-42. LCP former employee Duane Carver testified that, some time between 1987 and 1993, he stepped into the cellroom sump hole and went in up to his waist. R19-226-28. He knew that

the pH was "pretty high" because he quickly felt it. *Id.* at 228. He showered and was able to get most of it off so that he "didn't get burned all the way" and did not seek medical attention. *Id.* at 229-30, 251.

Environmental Protection Agency regulatory expert Paul Peronaud explained the hazardous waste classifications to the jury, R21-11-13, and the jury was instructed as to various types of hazardous wastes, R22-199-200.[30]

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30. Specifically, the jury was instructed:

> [T]he following wastes are listed as hazardous wastes under the Resource Conservation and Recovery Act, that is, RCRA:
>
> > K-106 is wastewater treatment sludge from the mercury cell process in chlorine production.
> >
> > K-071 is brine purification muds from the mercury cell process in chlorine production, where separately prepurified brine is not used.
> >
> > And U-151 is simply mercury.
>
> Now you are instructed that a solid waste exhibits the characteristic of toxicity for mercury if, using the test methods set forth in the regulations, a representative sample of the waste contains mercury at a concentration of equal to or greater than 0.2 milligrams per liter.
>
> Under the law, liquid wastes which are "corrosive" are identified as hazardous wastes. A liquid waste is

(Cont'd)

Appendix A

The Waste Water Treatment Operators Logs for the periods of the indictment showed that the wastewater often contained more than 200 parts per billion of mercury.[31] Govt. Exs. 4, 5, 6-1. Former LCP employee Dunn testified that Taylor directed the employees to "put a sign up" labeling the wastewater in the rail cars as "[h]azardous waste materials." R20-345. Taylor testified that the pH of the plant's wastewater was normally between seven and ten, and in concentration of eight to ten percent. R21-262, 264.

(Cont'd)

> considered to be corrosive if a representative sample of the waste is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5.
>
> I instruct you that when a hazardous waste listed under the regulations is mixed with a solid waste, the resulting mixture is a hazardous waste if the reason for the listing of the hazardous waste is that it is a toxic waste.

R22-199-200.

31. LCP former employee Carver explained that the line for "Discharge HC (ppb)" showed "the mercury level in the discharge water coming from the wastewater system." R19-209. The logs provided for thirteen readings per day, but readings were typically taken only twelve times per day. Mercury levels were recorded as above 200 for nine readings on 17 April, six readings on 28 June, eight readings on 28 August, four readings on 29 August, three readings on 12 September, four readings on 6 October, two readings on 9 October, three readings on 13 October, nine readings on 18 October, six readings on October 22, and nine readings on 5 November, 1993. Govt. Exs. 4, 5, 6-1. The logs show that the system was not working during readings on 17 April, 21 June, 27-28 June, 29 August, 12 September, 6-9 October, 12-13 October, and 18-21 October 1993. *Id.*

Appendix A

A "hazardous waste" is defined as

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may —
>
> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> >
> > (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). Hazardous wastes are categorized as either "listed" hazardous substances or "characteristic" hazardous substances. 40 C.F.R. § 261.3(a); R21-11-15. The "characteristic" hazardous substances are not per se hazardous but may be classified as hazardous if, because of a mixture with a hazardous substance, testing proves that the substance exhibits characteristics of hazardous waste. 40 C.F.R. §§ 261.3(a)(2)(i) and 261.20(a). Characteristics of hazardous waste include ignitability, corrosivity, reactivity, and toxicity. 40 C.F.R. §§ 261.21, 261.22, 261.23, and 261.24. Wastewater containing mercury is classified as a characteristic hazardous substance when the water contains 200 parts per billion or more of mercury. *Id.* at § 261.24(a), Table. "Wastewater treatment sludge from the mercury cell

process in chlorine production" is listed as hazardous waste K106. *Id.* at § 261.32. Wastewater containing caustic is classified as a characteristic hazardous substance when the water "has a pH less than or equal to 2 or greater than or equal to 12.5." *Id.* at § 261.22(a)(1). Once solid wastes are mixed with sludge or caustic, they are defined as hazardous. *Id.* at § 261.3(a)(2)(iv).

Where there is no sampling of the actual wastes, the government may prove the hazardous nature of the material by inventories, hazardous waste logs, internal memoranda, and trial testimony. *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 614 (5th Cir. 1991). The government is not required to prove that material is hazardous by EPA testing. *United States v. Self*, 2 F.3d 1071, 1086 (10th Cir. 1993). We find that the testimony of the former LCP employees and the wastewater logs were sufficient for the jury to find that the untreated wastewater contained enough mercury and caustic to meet the environmental laws' definition of hazardous substances or materials.

b. Storage of hazardous materials.

Taylor and Hansen maintain that the accumulation of wastewater on the cellroom floors did not violate federal law because the wastewaters were not stored there for the statutory requisite of 90 days. Croom testified that hazardous wastewater was on the cellroom floors "[a]t times," R16-114, and that hazardous materials were shipped, turned over, or treated within 90 days, R19-41. In response to a question as to whether wastewater on the cellroom floors was a regular occurrence in 1992, he responded that it was in both

cellrooms in 1992, but when he left "it was just mostly in #2." R16-114. Former LCP employee Roger Cooper testified that on 28 June 1993, although wastewater was pumped to the railcars for storage from cellroom two, the cellroom one floor was dry. R19-275-76, 281-82; Govt. Ex. 6-1. He explained that they "tried to keep [the wastewater in cellroom one] pumped over to #2 cellroom" because of the possibility that water would escape from cellroom one as a result of cracks in its floor. R19-284-85. Dirt dikes were constructed in the cellrooms to prevent the wastewater from leaking, but the dikes were frequently breached. R19-256; R25-26. The cellrooms were often "full of water" so that the employees had to wade into standing wastewater to repair the pumps. R20-318; R19-205.

Hazardous waste generators are permitted to "accumulate hazardous waste on-site for 90 days or less without a permit" if "the waste is placed" in tanks visibly marked with "[t]he date upon which each period of accumulation begins" and clearly labeled as "Hazardous Waste." 40 C.F.R. § 262.34(a)(1)(ii), (2), and (3). A "tank" is "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials . . . which provide structural support." 40 C.F.R. § 260.10.

There was no evidence that suggested that the cellrooms, in which earthen berms were constructed to contain the wastewater, were marked with the date of accumulation or labeled as containing hazardous wastes and thus qualified as "tanks." The testimony and logs indicate that the wastewater, which may have abated in cellroom one during various periods of time, remained in cellroom two and was present

for more than 90 days. Therefore, the evidence was sufficient for the jury to find that the wastewater was improperly stored.

3. Knowing Endangerment Under RCRA

Hansen, Randall, and Taylor argue that the evidence was insufficient to convict them for knowing endangerment. They acknowledge that the government may have shown that they "could have been aware" of the inherent dangers of working in a chlor-alkali plant, but argue that it failed to show that they knew and had an actual belief that the conduct which allegedly violated the environmental laws was substantially certain to cause death or serious bodily injury to others. Specifically, they maintain that, while the evidence showed that the employees were exposed to mercury, the evidence did not show that they were endangered due to any RCRA violation. They contend that the evidence of the employees' exposure to caustic was not sufficient to support the conviction for knowing endangerment. They claim that the government did not show that they had actual knowledge that their conduct in causing the RCRA violation was at that time substantially certain to place the employees in imminent danger of death or serious bodily injury. They also posit that there was no evidence that they were participants in any alleged conspiracy.

For a conviction of knowing endangerment under the RCRA, the government must prove that the defendants knowingly caused the illegal treatment, storage, or disposal of hazardous wastes while knowing that such conduct placed others in imminent danger of death or serious injury. 42 U.S.C. § 6928(e). A defendant acts "knowingly" "if he is

aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury." *Id.* at 6928(f)(1)(C). The defendant must have possessed "actual awareness or actual belief." *Id.* at 6928(f)(2)(A). Circumstantial evidence, "including evidence that the defendant took affirmative steps to shield himself from relevant information," may be used to prove the defendant's awareness or belief. Id. The knowing endangerment statute was drafted to "assure to the extent possible that persons are not prosecuted or convicted unjustly for making difficult business judgments where such judgments are made without the necessary scienter" "however dire may be the danger in fact created." S. Rep. 96-172, at 37-38 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5036-38. The penalties imposed by the knowing endangerment section were "designed for the occasional case where the defendant's knowing conduct shows that his respect for human life is utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." *Id.* at 38, 1980 U.S.C.C.A.N. at 5038. We have held that "[t]he government need only prove that a defendant had knowledge of the general hazardous character of the chemical" and knew "that the chemicals have the potential to be harmful to others or to the environment." *United States v. Goldsmith*, 978 F.2d 643, 645-646 (11th Cir. 1992) (per curiam) (internal quotations and citation omitted). "[W]hile knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference." *Self*, 2 F.3d at 1088.

The statute defines "serious bodily injury" as "(A) bodily injury which involves a substantial risk of death; (B) unconsciousness; (C) extreme physical pain; (D) protracted and obvious disfigurement; or (E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty." 42 U.S.C. § 6928(f)(6). A condition which may cause one of the statutorily defined conditions is sufficient to show "serious bodily injury." *See United States v. Protex Industries, Inc.*, 874 F.2d 740, 743 (10th Cir. 1989) (finding that a serious bodily injury was suffered by employees who contracted psychoorganic syndrome which may cause a mental faculties impairment).

a. The Evidence of Endangerment

Former LCP employees testified that they suffered serious skin and respiratory conditions from the wastewater on the cellroom floors.[32] A November 1992 memorandum

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32. Hugh Croom explained that "when the pH was high [in the wastewater on the cellroom floors] and somebody stepped over in it, it could easily burn their skin on their legs." R16-121. He volunteered that caustic could "peel the skin off" a person if he or she fell into it. R19-107. He said that airborne mercury could cause problems because of the potential for accumulation in the body. *Id.* at 108. Duane Carver testified that he received second-and third-degree burns on his thighs, R19-182, 197, and that he and other employees shoveled mercury off the cellroom floors, R19-192. He explained that there was "plenty" of mercury to see "under the mud and also beaded up on top in the mud." *Id.* He said that "[t]here would be so much [mercury] that it would be running off of the mud" and that "[y]ou could get a shovelful and lean your shovel over, and the mercury would just run off the shovel onto the floor." *Id.* at 192-93. John Baker testified that the wastewater "would cause severe burns." *Id.* at 245.

from Taylor to Randall showed Taylor's concern for needed repairs "to avert severe safety and environmental problems." Govt. Ex. 1-5. The urinalysis testing on employees showed "an increase" in the number with mercury levels which exceeded the 150 action level from 1986 to 1993. R21-294-96. Taylor admitted that most of the employees in the cellroom were removed to other plant locations "before any medical condition occurred" but said that he did not see any "reason to draw any correlation between" the rise in the number of employees exposed to excess mercury and the dumping of hazardous wastes and mercury. *Id.* at 294, 296.[33]

Expert testimony and reports linked exposure to mercury and caustic to a variety of serious health problems. The National Institute for Occupational Safety and Health (NIOSH) report on sodium hydroxide caustic indicated that local contact with caustic could result in "extensive damage to tissues, with resultant blindness, cutaneous burns, and perforations of the alimentary tract," with potential for development of "squamous cell carcinomas." Govt. Ex. 17-7b. The NIOSH report on inorganic mercury warned of the effects of mercury and mercury vapors to the central nervous system. Govt. Ex. 17-7c. Dr. Teitelbaum testified that exposure to caustic could cause burns ranging from first-to third-degree and could be lethal, and that exposure to mercury

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33. Taylor commented that "[j]ust because the trend happened to be the same on two completely unrelated events, does not necessarily tie them together." R21-296. He said that he "noticed a similar trend on two completely unrelated events." *Id.* at 297. He admitted "that the mercury vapor levels in the workplace did increase" and that "drums of dried waste can be a source of mercury." *Id.* at 297-98.

could cause mild tremors, personality changes, some detectable neurological abnormalities, changes in kidney function to severe kidney damage with potential death, and immune system problems. R20-229, 239-42. Dr. Teitelbaum opined that the employees were "in danger of death or serious bodily injury." R20-248. The evidence was sufficient for the jury to find that the defendants placed others in danger of death or serious bodily injury.

b. The Evidence of *Mens Rea*

The evidence showed that Hansen, Randall, and Taylor knew that the conditions of the plant were dangerous and that the conditions posed a serious danger to the employees. LCP former employee Wilbur Duane Outhwaite testified that he voiced his opposition to the use of the Bunker "C" storage with Hansen, and that Hansen responded that it was "his decision to make, and he decided to use them." R20-350. LCP acting plant manager Hugh Croom discussed his concerns regarding the dangerous conditions in the cellroom and the danger to the employees with Randall. R16-129-30. Croom and LCP former employee Outhwaite testified that Randall received daily reports from the plant managers concerning plant operations and "safety problems." R16-97-98; R20-359, 374. Randall was aware of the water on the cellroom floor and "wouldn't say that [he] wasn't unaware of the hazard," but thought that the walkway was "an acceptable resolution" to "eliminating the hazard to the employees while we worked to dry the cellroom floor." R21-224-25. He conceded that he was aware that the company was cited for willful violation of OSHA safety regulations as a result of water on cellroom floors. *Id.* at 225; Govt. Ex.

10-7i. Jesse Jones, a former LCP employee and a union representative, met with Randall to discuss the employees' safety issues, and Randall promised the needed repairs. R21-148. He said that he discussed the safety concerns, specifically "the water condition, the deterioration of the plant with the pipes, the leaks, and the safety equipment[ ]" with Hansen and Taylor. *Id.* at 146. Between 3 August 1993, and 4 February 1994, Randall was sent 22 reports listing 110 different violations of the NPDES standards. Govt. Exs. 10-1o-10-1nn. As LCP's environmental manager, Brent Hanson regularly advised Randall of the plant's environmental problems "[w]henever he was interested in things" and by monthly reports. R20-64-65.

As early as 1988, NIOSH informed Taylor that the plant employees had "extremely high" levels of mercury in their bodies which created "an unacceptably high potential for health effects," and that the mercury-contaminated wastes should be kept in vapor-proof containers. Govt Ex. 40-1c at 2. Despite this, the employees' exposure to high levels of mercury continued. In 1992, Taylor addressed his concerns about "severe safety" problems in a memorandum to Randall. Govt. Ex. 1-5. Taylor was aware that, during the spring of 1993, 23 cellroom employees were removed from their duty in the cellrooms due to their high levels of mercury and that the mercury level in the workplace increased. R21-294-95, 297. Taylor was aware of and concerned by the mercury-contaminated waste which was stored in drums in the cellrooms' basement and which was emitting elevated levels of mercury fumes. *Id.* at 298-303. He admitted that the mercury-contaminated mud on the cellroom floors posed a health risk and needed to be monitored. *Id.* at 301-02. He

testified that, on occasion, he would get into the water wearing protective equipment to make repairs and improvements to the pumps, and admitted that, if the wastewater got onto bare skin and was caustic, "you would start to feel a little burning or a little heat sensation" but that it could be neutralized by washing with the safety solution. *Id.* at 263-64. He said that such burns were "not unusual" in a caustic soda manufacturing plant through employee carelessness and equipment failures. *Id.* at 264.

c. Consent to the Risks

The RCRA knowing endangerment provision can be affirmatively defended if "the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of — (A) an occupation, a business, or a profession." 42 U.S.C. § 6928(f)(3). The evidence showed that the plant's environmental violations seriously endangered the employees and were not typical to chlor-alkali plants. Hugh Croom, the plant manager for the LCP chlor-alkali plant in North Carolina, testified that the dangerous conditions in the Brunswick plant were not present in the North Carolina plant because the North Carolina plant had adequate waste treatment equipment and facility maintenance. R16-108-09, 127-29; R19-32-34, 52, 107-09.110-11. He said that he discussed his concerns regarding the environmental issues, the wastewater treatment system issues, and the dangers to the employees with Randall and with Taylor. R16-129-30. LCP environmental manager Brent Hanson noted that, although covering mercury with water to limit mercury vapors was an accepted practice within the chlor-alkali

industry, it was usually practiced "in a little more confined manner" than the condition of the cellrooms, it was not an industry practice to allow such quantities of mercury to accumulate on the cellroom floors, and he knew of no other chlor-alkali plants that permitted such a condition to exist. R20-145, 153. Dr. Teitelbaum testified that, although he did not think that "you can get a zero risk" in a chlor-alkali plant, he thought "you can make chlor-alkali plants safe so that workers under everyday conditions are extremely unlikely to be hurt." R20-245.[34]

The employees also did not freely consent to conditions at the plant. They complained to management, including Hansen, Randall, and Taylor, about the dangerous working conditions, and refused to work in the cellrooms. Union representative and former plant employee Jesse Jones testified that LCP suspended nine employees who refused to "go underneath the cellroom to repair the pump" because of the wastewater on the cellroom floor. R21-138-42. Jones said that he discussed his concerns about the working conditions with Hansen, Randall, and Taylor. R21-138-39, 146-48. Former employee Larry Barwick said that he complained "to whoever would listen," including the LCP management,

34. He noted that "the Swedish chlor-alkali industry . . . had air levels of 20 or below and urine levels which almost never exceeded 30" in 1990, demonstrating that such an environment was possible. R20-245. He explained that a safe environment could be promoted by the use of industrial hygiene, including "engineering controls, protective equipment, substitution of materials in places where you can substitute, and administrative controls as to how long and what kind of environments people work in." *Id.* at 246.

about the fumes[35] and visible mercury in the cell buildings.[36] R20-319-20. He refused to go into the cellrooms, and was once sent home for the day based on his refusal. R20-321. The evidence, therefore, was sufficient to show that the defendants knew that the plant's violations of the CWA and RCRA violations were inevitable, that the plant was incapable of complying with environmental standards, and that the employees were endangered while working within this environment without consenting to the risk.

4. Conspiracy

Hansen, Randall, and Taylor argue that the district court erred by not granting their motions for acquittal because the government never proved a conspiracy. They maintain there

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35. Barwick said that:

> [T]he fumes from the acid burners were coming down and you couldn't breathe without wearing a respirator.
>
> It would burn your skin. It would take the hair off of your arms. It would get in your eyes, under your goggles. And everything-it had caustic. It had bleach. It had acid fumes. . . . After probably the last year or year and a half, that was probably a regular everyday thing almost, that you would get gas somewhere in [the cell building]. R20-319-20.

36. Barwick testified that the mercury "was everywhere . . . the floors, the ledges, the beams, any place you had to get up in to to change headers . . . You would have mercury on the beams. You would have mercury on the floors. When you would take the headers apart, mercury would run out of them." R20-320.

was no showing of an agreement between them, the operation of the plant was a legal act, and they did not pursue the objectives of the conspiracy. Randall suggests that the evidence showed that he took affirmative steps to improve compliance. Taylor contends that he was not involved in the operations at the Brunswick plant for a significant period of the "conspiracy" and authored several memos to management expressing his concerns regarding the plant's operation once he began working there. He maintains that, after assuming the plant manager position, he recommended shutting down the plant or at least one of the cellrooms and, when those recommendations were rejected, he spent several months seeking money for maintenance. He also argues that the evidence showed that he directed that the reports be truthful and accurate.

To obtain a conviction under 18 U.S.C. § 371, "the government must show: '(1) the existence of an agreement to achieve an unlawful objective; (2) the defendant's knowing and voluntary participation in the conspiracy; and (3) the commission of an overt act in furtherance of the conspiracy.' " *United States v. Harmas*, 974 F.2d 1262, 1267 (11th Cir. 1992) (quoting *United States v. Cure*, 804 F.2d 625, 628-30 (11th Cir. 1986)). "An agreement may be proved by either direct or circumstantial evidence and a common scheme or plan may be inferred from the conduct of the participants or from other circumstances." *United States v. Diaz*, 190 F.3d 1247, 1254 (11th Cir. 1999). However, it is "essential" "that the object of the agreement must be illegal." *United States v. Toler*, 144 F.3d 1423, 1426 (11th Cir. 1998). "Each party to a continuing conspiracy may be vicariously liable for substantive criminal offenses committed by a co-

conspirator during the course and in the furtherance of the conspiracy, notwithstanding the party's non-participation in the offenses or lack of knowledge thereof." *United States v. Mothersill*, 87 F.3d 1214, 1218 (11th Cir. 1996) (*citing Pinkerton v. United States*, 328 U.S. 640, 646-47, 66 S. Ct. 1180, 1184 (1946)). In the usual *Pinkerton* case, it is not necessary for the court to inquire into a particular conspirator's individual culpability, "so long as the substantive crime was a reasonably foreseeable consequence of the conspiracy." *United States v. Alvarez*, 755 F.2d 830, 849-50 (11th Cir. 1985). It is unnecessary for the government to prove that each conspirator participated in all aspects of a conspiracy, knew each phase or every detail of the conspiracy, or knew all of the participants. *United States v. Pedrick*, 181 F.3d 1264, 1272 (11th Cir. 1999). A conspirator may be convicted if he "participates in some affirmative conduct designed to aid the success of the venture with knowledge that h[is] actions would further the venture." *Id.* A defendant may be convicted of conspiracy if he joined the conspiracy after its inception and played only a minor role within it, *United States v. Knowles*, 66 F.3d 1146, 1155 (11th Cir. 1995), and he is presumed to be a part of the conspiracy until all conspiracy activity ceases or he proves that he withdrew. *United States v. LeQuire*, 943 F.2d 1554, 1563-64 (11th Cir. 1991). To show withdrawal, a conspirator must show that he "has taken affirmative steps to defeat the objectives of the conspiracy," and "made a reasonable effort to communicate these acts to his co-conspirators or disclosed the scheme to law enforcement officers." *Id.* at 1564.

The indictment charged that, from July 1985 to 1 February 1994, Hansen, Randall, and Taylor "did knowingly

and willfully combine, conspire, confederate and agree together and with others" to knowingly act in violation of the environmental laws by "continu[ing] to operate the Brunswick facility" after learning that they were in violation, storing and disposing of hazardous wastes without a permit, and submitting "incomplete, inaccurate, and misleading information" in their reports to the various state and federal regulatory agencies. R1-1-10-14. The evidence showed that the defendants admitted to sharing the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and the defendants' knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of environmental laws. The defendants knew of the violations from either personal observation or from information that they received from the plant employees, and frequently communicated with each other regarding operation of the plant despite the continuous environmental concerns. The defendants failed to provide the corporate board with information about the violations, and failed to accurately present the plant's inability to comply with the regulations to the Georgia EPD. Each of the substantive offenses were foreseeable consequences of the agreement to continue operating the plant in violation of the environmental statutes.

5. Knowledge of the Substantive Offenses

Randall argues that the district court erred in denying his motion for acquittal because the government failed to show that he had the requisite "knowledge" of the CWA and RCRA violations on the specific dates when they occurred.

He contends that his knowledge after the violations had occurred was not sufficient. The statutes for the violations under which Randall was indicted contain explicit knowledge requirements. For a conviction under 33 U.S.C. § 1319(d)(2)(A), the defendant must be shown to have "knowingly" violated various sections of the CWA or permit conditions or limitations. For a conviction under 42 U.S.C. § 6928(d)(2)(A), the defendant must be shown to have "knowingly" treated, stored, or disposed of an identified hazardous waste without a permit. We have held that the knowledge element is satisfied where a defendant, who may not have "directly" caused a hazardous waste violation but had "approved of previous dumpings as a way to meet storage squeezes," "effectively ordered" a subsequent violation when he instructed a subordinate to "handle" hazardous waste. *United States v. Greer*, 850 F.2d 1447, 1451-52 (11th Cir. 1988).

Here, although Randall did not directly cause the violations, he knew that the plant was violating its permit on an almost daily basis, accumulating wastes that it could not treat, and was frequently releasing the wastes from the cellrooms as needed to keep the plant operational. He received 22 written reports between 3 August 1993 and 4 February 1994 advising him of a total of 110 different violations of the NPDES permit. He received frequent and sometimes daily oral and written reports from the various plant managers of the plant's operations and safety concerns. He knew that the plant was incapable of complying with the environmental standards and knew that the violations were inevitable. We conclude that the evidence that Randall permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the

procedures were in violation of environmental regulations was sufficient to show that Randall acted "knowingly."

C. *Jury Instructions*

Hansen, Randall, and Taylor argue that the district court's jury instructions misstated the reasonable doubt standard, improperly applied the concept of responsible corporate officer, improperly defined the elements of knowing endangerment, and effectively eliminated the mens rea requirement from each of these statutory violations. Hansen contends that the instructions essentially instructed the jury that they could convict him because of his job title.

" 'We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party.' " *United States v. Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997), quoting *United States v. Chandler*, 996 F.2d 1073, 1085 (11th Cir. 1993). We review the district court's denial of a requested instruction for abuse of discretion, because a defendant is entitled to an instruction on a defense theory if it has some basis in the evidence and is supported by law. *Grigsby*, 111 F.3d at 814. A defendant cannot challenge a jury instruction on a ground not raised at trial unless he establishes "plain error" under Fed.R.Crim.P. 52(b). *United States v. Meester*, 762 F.2d 867, 879-80 (11th Cir. 1985). If the requirements of Rule 52(b) are satisfied and the instruction was made in error, is plain, and affected substantial rights, we "may then exercise [our] discretion to notice a forfeited error, . . . only if . . . the error seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461,

466-68, 117 S. Ct. 1544, 1548-49 (1997) (internal citations omitted). Under the invited error doctrine, we will generally not review an error induced or invited by a party through the submission of an incorrect jury instruction to the judge which passed on to the jury. *United States v. Stone*, 139 F.3d 822, 838 (11th Cir. 1998) (per curiam).

1. Reasonable Doubt Standard

Hansen and Randall maintain that the district judge misstated the essential basis of the convictions by instructing that the government did not have to prove guilt beyond a reasonable doubt. In his introduction to the jury instructions, the district judge advised the jury that he would read them the jury charge and would provide them each a copy of the charge for them to "refer to it at any time you think is appropriate" when they were sent out to deliberate. R22-172. The district judge then orally instructed the jury on reasonable doubt as follows:

> So the Government always has the burden of proving a Defendant guilty beyond a reasonable doubt. If it fails to do so, under your oath, you would have to find that Defendant not guilty.
>
> *But while the Government's burden is a heavy burden, it is not necessary that the Defendant's guilt be proved beyond a reasonable doubt, because that is generally impossible. The law does not require a mathematical certainty, only the exclusion of any reasonable doubt concerning that Defendant's guilt.*

Appendix A

> In that regard, a "reasonable doubt" is defined as a real doubt, based upon reason and common sense after a careful and impartial consideration of the entire evidence in this case, or the lack of evidence.
>
> Proof beyond a reasonable doubt, in other words, is proof of such a convincing character that you would be willing to rely or act upon it without hesitation in a decision involving the most important of your affairs. But you take a common sense view. . . .
>
> You may not find a Defendant guilty unless you find that the inferences you draw from the evidence are consistent with the theory of his guilt and inconsistent with reasonable theories of innocence. If you are convinced that a Defendant has been proved guilty beyond a reasonable doubt, say so with a verdict of guilty. On the contrary, if you have reasonable doubt, then under your oath, you would have to find that Defendant not guilty.

R22-174-75 (emphasis added). No objection was made as to this instruction. R22-206-09.[37]

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37. The government argues that there may be an error in the transcript. Government brief at 23. There is no indication that this matter was submitted to and settled by the district court consistent with the procedure outlined in Fed.R.App.P. 10(e).

The district judge provided the parties with an opportunity to

(Cont'd)

The passage, as provided to the jury in the written charge, read:

> Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning a Defendant's guilt.

R6-133-2.

"[W]e consider [a reasonable doubt] instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof." *Harvell v. Nagle*, 58 F.3d 1541, 1542 (11th Cir. 1995). The jury must be instructed that defendant's guilt must be proved by the government "beyond a reasonable doubt" on each element of the charged offense, but the trial court is not required to define reasonable doubt. *Id.* If the trial court defines reasonable doubt, the standard must be explained correctly. *Id.* A district court's failure to submit an element of the offense to the jury, including an erroneous instruction on reasonable doubt, is a

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(Cont'd)
"[s]tate [their] exceptions" after the jury instructions were read. R22-206-09. Taylor's counsel said he had been "listening carefully to the charge" and had heard the word "water" used in the place of "wastes." *Id.* at 208. He then noted that the jury "will have it to read." *Id.* Taylor's counsel also observed that the word "person" had been defined as an "individual corporate officer" instead of a "responsible corporate officer;" the judge made a curative instruction. *Id.* at 208-09.

structural error which defies the harmless-error analysis. *Johnson*, 520 U.S. at 468-69, 117 S. Ct. 1544 at 1549-50. Although we have held that "an inadequate reasonable doubt instruction cannot be cured by other circumstances at trial," *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994) (reversing a conviction in which the instruction defined reasonable doubt using the phrase "substantial doubt"), "[j]ury instructions are not considered in isolation; rather we view them in the context of the entire . . . proceeding." *Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995).

Here, the improper passage is immediately prefaced and followed by a correct instruction, and the correct instruction was included in the written copy provided to each juror. The judge stated the correct instruction numerous times, including each element of each offense to be proven. *See* R22-172, 173, 182, 185, 187,189, 193-94, 199-201. The instruction, as written and as provided to the jury, was not inadequate and presented the correct reasonable doubt standard. Viewing this instruction as a whole and in the context of the entire proceeding, we find that it did not mislead the jury as to the reasonable doubt standard. *See United States v. Torres*, 901 F.2d 205, 243 (2nd Cir. 1990) (rejecting a challenge to the language used in one sentence of a reasonable doubt standard where a correct instruction was provided "immediately after" the challenged language and provided at least five times in the instructions in general and as to the specific offenses); *but see Bloomer v. United States*, 162 F.3d 187, 189, 194 (2nd Cir. 1998) (finding an improper reasonable doubt instruction constitutionally deficient despite at least 17 proper instructions where there was no curative instruction to alert the jury to disregard the incorrect instruction.)

2. Reasonable Corporate Officer

Hansen and Randall contend that the district judge undermined the jury's fact-finding function by directing that they treat the defendants as "responsible corporate officers" ("RCO"). They maintain that the instruction as given permitted the jury to convict them on the basis of their corporate positions instead of their individual liability. They suggest that the district court's separate RCO instruction allowed the jury to believe that it applied equally to the conspiracy, CWA and RCRA charges.

The district judge instructed the jury:

> Under the federal Clean Water Act, the definition of a "person" specifically includes corporations and individual corporate officers. You are instructed that the Defendants, Christian Hansen, Randall Hansen, and Alfred Taylor are persons for purposes of the Clean Water Act.

R22-191. Taylor's attorney objected that "[t]he statute says, '. . . and responsible corporate officers.' " R22-209. The district judge then explained "[w]herever I have used the term 'corporate officers,' I mean responsible corporate officers." *Id.*

In a CWA case, "the term 'person' means . . . any responsible corporate officer." 33 U.S.C. § 1319(c)(6). The RCRA counts require proof that each defendant "knew" of the violations' potential for harm and danger. 42 U.S.C. § 6928(e). In *United States v. MacDonald & Watson Waste*

Oil Co., 933 F.2d 35 (1st Cir. 1991), the First Circuit vacated a conviction under 42 U.S.C. § 6928(d)(1) after finding that the district court's instruction, which relied on the RCO doctrine in part and which instructed "that the officer must have known or believed that the illegal activity of the type alleged occurred" incorrectly permitted a finding of guilt without a determination that the defendant possessed actual knowledge of the specific violation. *Id.* at 51. The First Circuit reasoned that the RCO doctrine was inapplicable where the defendant was charged under a statute that required explicit knowledge. *Id.* at 51-55. The Ninth Circuit has held that:

> [U]nder the CWA, a person is a "responsible corporate officer" if the person has authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.

United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998). Explaining that "[t]he relevant inquiry is whether the instructions *as a whole* are misleading or inadequate," the Ninth Circuit rejected the defendant's argument that the RCO "instruction allowed the jury to convict him without finding a violation of the CWA." *Id.* at 1026. The district judge had stated the elements needed for the government's proof and told the jury that the CWA " 'also holds accountable' " RCOs. *Id.* The Ninth Circuit found the instructions not erroneous, reasoning that "the [RCO] instruction relieved the government *only* of having to prove that defendant *personally*

discharged or caused the discharge of a pollutant" and that "[t]he government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants." *Id.* We find this issue meritless. The clarifying instruction given by the district court was requested by the defendants. The district court's instruction on responsible corporate officer was not given as to the CWA counts, Counts 2-21, but was given only as to Counts 22-34.

3. Knowing Endangerment

Hansen argues that the instructions authorized the jury to convict him of knowing endangerment without making a determination that he knew of an imminent danger. Hansen requested that the instruction include the "element of knowingly" on "each element of the offense" to insure that the jury understood that the charges were related to "individual, personal, knowing, knowledgeable, deliberate conduct." R22-53-55. The district judge noted that the preface to the instructions included "knowingly" and agreed that he would add an instruction that "[t]he term knowingly is applicable to each element of the offense." *Id.* at 54, 56. Hansen's attorney responded "[t]hat would help, Judge." *Id.* at 56. Later, the government requested that the instructions for "willful" be limited to count 1 and that the instructions for "knowingly" apply to the remaining counts. *Id.* at 70-71. Hansen's attorney stated that he "strongly disagree[d]," but the judge indicated that he would permit the instruction, as clarified, to stand. *Id.* at 71. At the end of the charge conference, Hansen's attorney renewed his objection to the district judge's failure to give the knowing instruction as to each offense. *Id.* at 206-07. Because the instruction required

that the jury find that Hansen knew that the violations could cause imminent danger, this argument is meritless.

4. *Mens Rea* Requirement

Hansen argues that the instructions permitted the jury to convict him of the RCRA violations without making factual findings that he had knowledge of the RCRA elements of hazardous materials, permit regulations, and the treatment, storage, or disposal of hazardous wastes. He maintains that the instruction reinforced the government's position that Hansen should be convicted because LCP was his company, and not based on the legally required relationship between Hansen and the violations. During the charge conference, Randall's attorney objected to an instruction as to Counts 22-34, arguing that it should be limited to Counts 22-33, because Count 34 had additional elements. R22-59-63, 65-66. He asked that an instruction be added limiting liability to knowledge possessed by the defendant himself, and the district judge responded "[a]ll right. All right. We will add that.". *Id.* at 61.

During closing argument, the government stated:

> Chris Hansen is a hands-on manager. You heard discussions of how he ran the plant. I would submit it was probably his way or the highway. Does anybody doubt he would have known what was going on at every place in the plant? He was there. He ordered the Bunker C tanks to be filled.

R22-99-100. The district judge explained that:

> a person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness. Whether a Defendant acted knowingly may be proven by the Defendant's conduct and by all of the facts and circumstances surrounding the case.

Id. at 188. Addressing the RCRA counts, the district judge instructed:

> Each count charges the . . . Defendants, all of them, unlawfully treated, stored, or disposed of one or more hazardous wastes without the required permits.
>
> Now in order to prove a Defendant guilty of those charges, the prosecution must establish the following essential elements:
>
> First, that on or about the date charged in Counts 22 through 34, the Defendant under consideration knowingly treated, stored, or disposed of one or more of the solid wastes listed in those counts;
>
> Next, that such solid wastes were listed or identified under RCRA as hazardous wastes; and
>
> Third, that the wastes were treated, stored or disposed of at a location which did not have either interim status or a RCRA permit authorizing the treatment, storage or disposal of such wastes.

Id. at 192. The district judge also charged that "the Government must prove beyond a reasonable doubt that the Defendant under consideration knew that substances involved in the alleged offenses had the potential to harm others or the environment." *Id.* at 193. The district judge continued:

> Now each Defendant may be found guilty of Counts 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:
>
> First, that the Defendant under consideration had a responsible relationship to the violation-that is, that it occurred under his area of authority and supervisory responsibility;
>
> Second, that the Defendant had the power or the capacity to prevent the violation; and
>
> Third, that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

Id. at 200-01. Randall's counsel renewed the objection that the instruction as to Count 34 was erroneously included because it could not be based on constructive knowledge. *Id.* at 207.

We have held that a defendant's "knowledge [as to whether a site has a permit or the disposal of hazardous waste] does not require certainty, and the jurors may draw inferences from all of the circumstances, including the existence of the regulatory scheme." *United States v. Hayes Int'l Corp.*, 786

F.2d 1499, 1505 (11th Cir. 1986) (reviewing a conviction under 42 U.S.C. § 6928(d)(1)). As to Count 34, RCRA's knowing endangerment provision also requires proof that the hazardous waste violation placed persons in "imminent danger of death or serious bodily injury" and that the defendant had knowledge of that danger. 42 U.S.C. § 6928(e). Because the instructions clearly set forth that a finding of "acted knowingly" was required for a conviction, there was no error in the instruction.

5. Wastewater Treatment System

Hansen contends that the instructions allowed the jury to convict him under the CERCLA release offenses without a finding that he knew the quantity of the materials released or was meaningfully in charge at the time of the release. Taylor argues that, because the instruction failed to include the definition of "tank," it allowed the jury to consider the cellroom as a part of the wastewater treatment system. In his request for a charge as to Counts 35 through 40, Hansen asked that the jury be instructed that it could not convict him unless he was the person in charge at the time of the release and knew that the released hazardous materials exceeded the applicable reportable quantity. R4-98, Request to Charge No. 23.[38]

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38. Specifically, Hansen requested that the charge read:

> *First*, that on the date alleged in each respective count, Christian Hansen was a "person in charge of a facility," as that term is defined by law;
>
> . . .

(Cont'd)

Appendix A

The district judge instructed the jury:

> Now Counts 35 through 41 charge the Defendants, Mr. Christian Hansen and Mr. Taylor with violations of the Comprehensive Environmental Response, Compensation, and Liability Act, which is known by the acronym CERCLA, which requires the immediate reporting of the release of a reportable quantity of a hazardous substance into the environment.
>
> . . .
>
> To establish a violation of this Act, as alleged in Counts 35 through 41, the Government must prove the following elements beyond a reasonable doubt as to each Defendant:
>
> First, that the Defendant was one of the "persons in charge" of a facility;
>
> With respect to Counts 35 to 40, that a reportable quantity of mercury contaminated wastewater — that is, more than one pound of

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(Cont'd)

> *Fourth*, that Mr. Hansen (1) knew that the described release had occurred, (2) knew that the wastewater released contained a reportable quantity of mercury, and (3) knew that the release was not allowed by any federal permit.

R4-98 at Charge 23.

wastewater contaminated with mercury and other hazardous substances — was released into the environment within a 24 hour period;

As to count 41, that a reportable quantity of chlorine-that is, in excess of 10 pounds — was released into the environment within a 24 hour period; and

That the Defendant under consideration failed to notify immediately the National Response Center of the release of such materials as soon as he had knowledge of the release.

CERCLA's reporting requirements are not extended to all employees involved in a release. The reporting requirements apply to any person — even if of relatively low rank — who was in a position to detect, prevent, and abate a release of the hazardous substances.

. . .

A "person in charge's" control over a facility need not be sole or exclusive. There may be several "persons in charge" of the same facility. It is only necessary that the individual have or share such control of the facility where the release occurred.

R22-201-02.

In clarifying the definition of "operator" under CERCLA, the Supreme Court instructs that "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility . . . specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887 (1998). The district court's instructions required that the jury find that the defendant under consideration knew of the release and knew that the release contained hazardous waste, and failed to report it.

There is no indication in the record that Taylor requested an instruction on the definition of "tank." Hansen requested an instruction on the existence of the wastewater treatment exemption to the 90-day labeling and disposal period.[39] R22-68-69. The judge subsequently included such an instruction:

> Tanks which are part of a wastewater treatment system that is subject to regulation under the CWA need not have a RCRA permit so long as they are used for the treatment of wastewater. Therefore, wastewater which is being held

39. Hansen's counsel explained that he "just want[ed] the jury to understand that if the water is handled through the wastewater system, it's exempt from the ninety-day labeling and all these other things." R22-69. The government counsel responded: "If it's in a tank. It needs to be clear that if it's in a tank and it can be treated in a wastewater system —." *Id.* The district judge asked that the language be provided to him in writing, and Hansen's counsel agreed to do so. *Id.*

> temporarily in such tanks is not subject to these RCRA permitting requirements.

Id. at 199.

A "tank" is defined by the regulations as "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g. wood, concrete, steel, plastic) which provide structural support." 40 C.F.R. § 260.10. Although Taylor maintains that the instruction would have helped the jury understand that the cellroom was a tank and part of the wastewater system, the evidence showed that the berms, used in the cellroom to contain the wastewater, were constructed of dirt. R19-256. Taylor neither requested a definition of "tank" in the instructions nor was prejudiced by the failure to of the court to provide it.

E. Sentencing Guidelines

We review the district court's factual findings for clear error and its application of the law to those facts *de novo*. *United States v. Quinn*, 123 F.3d 1415, 1424 (11th Cir. 1997).

1. Downward Departure

a. Christian Hansen

Hansen argues that the district court erred by concluding that it lacked the authority to depart under U.S.S.G. § 5K2.0. He maintains that, at a minimum, the district court was ambiguous as to whether it believed that it had the authority

to grant a downward departure and that any ambiguity must be resolved in his favor.[40]

At sentencing, Hansen argued, *inter alia*, that he should be granted a downward departure pursuant to U.S.S.G. § 5K2.0 because the factors of the case took it outside of the heartland of cases to which the guidelines apply. R13-5-8. He argued that a departure was warranted because the government agencies monitored and knew of the environmental violations, and that this situation was not where Congress intended to impose the high penalties for environmental violations. *Id.* at 6. After sentencing Hansen, the district judge stated that he "d[id] not really find any actual basis for a departure from the guidelines, even though I might, if I had discretion, found otherwise." *Id.* at 52.

We "generally may not review the merits of a district court's refusal to grant a downward departure, [but] may conduct a *de novo* review of a defendant's claim that the district court mistakenly believed it lacked the authority to grant such a departure." *United States v. Mignott*, 184 F.3d 1288, 1290 (11th Cir. 1999) (per curiam). Where the district court expresses ambivalence about its authority to depart from the guidelines, we review the record to determine the

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40. Amicus curiae The Washington Legal Foundation also raises the issue that Hansen's sentence must be vacated because the environment sentencing laws were unlawfully promulgated and impose patently unreasonable sentences. However, this issue was not considered before the district court and will not be considered on appeal. *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 840 n. 13 (5th Cir. 1975) (noting that it would not consider issues briefed by amicus curiae which were not raised in the district court).

district court's understanding. *See United States v. Webb*, 139 F.3d 1390, 1394-95 (11th Cir. 1998) (noting that "our independent review of the sentencing transcript reveals that the sentencing judge, at the very least, was bewildered and ambivalent as to whether the guidelines authorized a downward departure" and that "on balance, . . . the record more strongly suggests that the court believed that it was not authorized to depart downward."). If there is no indication that the district court misapprehended its authority, "we assume that the sentencing court understood it had authority to depart downward." *United States v. Chase*, 174 F.3d 1193, 1195 (11th Cir. 1999).

Hansen was sentenced after Randall. During Randall's sentencing hearing, the district judge acknowledged his authority to depart. R9-9. Hansen's sentencing transcript shows that the district judge permitted extensive discussion of whether the circumstances of Hansen's case were outside the heartland of cases to which the guidelines had been applied, and that neither party argued that the district court lacked the authority to depart downward. There is nothing in the record that shows that the district court misapprehended its authority to depart downward. Therefore, we assume the sentencing court understood its discretionary authority to grant a downward departure but decided not to exercise that authority. *Id.* at 1195. Because the district court understood that it had the authority to depart, we are unable to review the district court's denial of Hansen's request for a downward departure.

b. Randall Hansen

Randall contends that the district court erred in not granting his requests for a downward departure under §§ 5K2.0 and under 5K2.11. As to a departure under § 5K2.0, he argues that his case fell outside the heartland of other environmental prosecutions and that he was at all times operating under the authority of the U.S. Bankruptcy Court and upon the advice of his environmental counsel. As to a departure under § 5K2.11, he maintains that the district court erred in concluding that financial factors were not a "perceived greater harm" which could trigger a departure and in not understanding that the record supported his belief that a greater environmental, as well as economic, harm would occur at the site and in the community if the plant failed to remain operational.[41]

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41. Randall also argues that the sentencing guidelines, as applied to environmental crimes, are arbitrary and were unlawfully promulgated. Randall did not raise this issue at the sentencing hearing but addressed it in a supplemental memorandum in aid of sentencing. R9-228-8. Randall's sentencing hearing initially commenced on 2 June 1999, and was continued on 1 July 1999. On 1 July 1999, the hearing was called to order at 10:01 AM, and recessed at 10:24 AM. The supplemental memorandum is not referenced at the sentencing hearing and was filed at 12:11 PM on 1 July 1999. Therefore, it does not appear that this was considered by the district court. Because the issue was not considered by the district court, it will not be considered by this court. *Fed. Deposit Ins. Corp. v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

Appendix A

At Randall's sentencing, the district judge stated:

> [T]he Court acknowledges that it does have authority to depart from the guidelines pursuant to [§§ 5K2.0 and 5K2.11] if it finds that the circumstances of this case warrant such a departure.[42]

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42. It appears that, although the district judge did not find that the circumstances warranted a departure, he nonetheless considered Randall's arguments. During the hearing, the district judge continued:

> As to the Defendant's arguments concerning lesser harm, I'm not particularly impressed with that. For the Court to consider a departure under this section [§ 5K2.11], the Court would have to find either that the Defendant committed the crime in order to avoid perceived greater harm or that the Defendant's conduct does not cause or threaten the harm or evil sought to be prevented by the laws prohibiting the offenses at issue.
>
> Now as to that first prong, the Defendant has failed to produce evidence, other than his own statement, that closing the LCP plant would have caused a greater harm than allowing it to continue operating in the unsafe manner. His argument, as I understood it, is based upon financial reasons. As I recall, he stated that there was compelling societal interest in keeping the plant open and its three hundred employees working.
>
> While sympathetic to the plight of the employees who would have, and eventually did, lose their jobs, that does not, and I do not believe that it justifies subjecting the employees and the community to the risk of operating an unsafe chlor-alkali plant.

(Cont'd)

Appendix A

(Cont'd)

> The Court finds that financial factors are not a perceived greater harm. And, therefore, no downward departure is warranted in that instance.
>
> As to the second prong, the guidelines permit a downward departure where the conduct may not cause or threaten the harm or evil sought to be prevented by the law prescribing the offense at issue.
>
> The environmental laws for which the Defendant was convicted were enacted to protect human life in the environment. Therefore, the Defendant's conduct was the type of conduct which the environmental laws sought to prevent. And as such, the Court finds that the circumstances of this offense do not warrant a downward departure under 5K2.11 of the guidelines.

R14-9-11.

As to the request for a departure under § 5K2.0, he stated:

> [I]n order for the Court to find that the Defendant's case falls outside the heartland, the Court has to find that this is an unusual case where there is something atypical about the Defendant or the circumstances surrounding the commission of the crime. I simply cannot make such a finding.
>
> I find that the circumstances of these offenses are those contemplated by the Sentencing Commission in the formulation of the guidelines. And further, I find that there are no factors which take this case outside the heartland of the environmental guidelines. Accordingly, the Court finds that no departure is warranted under 5K2.0 of the guidelines.

Id. at 11.

R9-9. He set forth the requirements for a departure under the guidelines, but found that no departure was warranted under either provision.

We may not review a district court's refusal to grant a downward departure unless the court mistakenly believed that it lacked the authority to grant such a departure. *Mignott*, 184 F.3d at 1290. Despite Randall's argument to the contrary, the district judge indicated his understanding that financial factors could be a "perceived greater harm" by weighing the harms associated with closing the plant and putting 300 employees out of work against keeping the plant open as an unsafe chor-alkali plant and keeping the employees working, but found that the financial factors were not a harm greater than the harms associated with the operation of an unsafe chlor-alkali plant. R14-9-11. Because the district court acknowledged that it had the authority to depart, we lack the jurisdiction to review the decision.

b. Taylor

Taylor also argues that the district court erred by not granting him a downward departure under §§ 5K2.0 and 5K2.11. As to the request for a departure under § 5K2.0, he maintains that his case fell outside the heartland of environmental cases. As to the request for a departure under § 5K2.11, he contends that he believed that closing the plant would cause a greater environmental harm that continuing operations.

Taylor presented each of his issues at sentencing.[43] R12-20-21. The district judge asked the probation officer to comment on Taylor's requests for a departure, and to specifically address Taylor's cooperation during the cleanup efforts. *Id.* at 21-22. The probation officer responded that there were no grounds for a downward departure.[44] *Id.* at 41. The district judge commented:

> I am equally bound by the guidelines and by the law. And I do not have much discretion.
>
> . . .
>
> And I just cannot find a basis for departure under the guidelines, inasmuch as the facts as

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43. Taylor adopted Hansen's arguments for a departure, but added that, as to the request for a departure under § 5K2.11, that they had "prevented a greater harm from merely shutting down the plant without the proper decommissioning" based on their belief that "these problems, maintenance problems, could be addressed, the jobs could be saved, and the business could continue." R12-20-21. He "also call[ed] the Court's attention . . . to Mr. Taylor's conduct following the decommissioning of the plant." *Id.*

44. The probation officer noted that Taylor's cooperation should not be a factor since he was a contract, paid employee. *Id.* at 24. In response to Taylor's argument that "there's a lesser harm in keeping somebody employed than dumping hundreds of thousands of gallons of contaminated water into a marsh," he commented that "there was a tremendous amount of harm done to the environment. . . They're not looking at the effects. . . . [The] area was closed off by the Georgia Environmental Protection department because the fish and the seafood in there w[ere] contaminated. We will never know what damage this has all done." *Id.* at 40.

> found are of the kind contemplated by the Sentencing Commission.

Id. at 42-43.

Because there is nothing in the record that indicates that the district court misapprehended its authority to depart downward, we assume that the district court understood its authority to depart and decided not to exercise its discretionary authority. Therefore, we lack jurisdiction to address the district court's decision not to depart.

III. CONCLUSION

After reviewing the record and carefully considering the briefs and oral argument, we conclude that the defendants' convictions are supported by the evidence, and that the district court did not err in the evidentiary rulings, the jury instructions, or at sentencing. Accordingly, we AFFIRM.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION DATED AND FILED APRIL 26, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

NO. CR298-23

CRIMINAL ACTION

UNITED STATES of AMERICA,

v.

CHRISTIAN A. HANSEN, RANDALL W. HANSEN, and ALFRED R. TAYLOR,

ORDER

This criminal case is before the Court on the Defendants' Motions for Judgment of Acquittal and Motions for New Trial. The Defendants were indicted for various violations of the Clean Water Act ("CWA"), 33 U.S.C. §1319(c)(2); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6928, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9603, and the Endangered Species Act ("ESA"), 16 U.S.C. §1538 and §1540, as well as for conspiracy to violate these environmental statutes. After a five day trial, the jury found Defendants guilty of conspiracy and violations of the CWA, RCRA, and CERCLA. Renewing various objections made

at trial, Defendants now move for judgments of acquittal or for a new trial on grounds of insufficient evidence and court error in charging the jury, in admitting certain evidence, and in denying Defendants' previous Motions for Judgment of Acquittal.

After considering the Defendants' Motions and Briefs, the Government's Combined Response, and trial transcripts, the Court will find that Defendants' Motions for Judgment of Acquittal should be **DENIED** and that Defendants' Motions for New Trial should be **DENIED**.

I. *FACTS*

This criminal case arose from the operations of a chlor-alkali plant on Ross Road in Brunswick, Georgia. That plant (hereinafter, the "LCP plant") was owned by LCP Chemicals, a subsidiary of Hanlin Group, Inc. The LCP plant is adjacent to tidal marshes and Purvis Creek[1] and operated continuously, year round, manufacturing chlor-alkali bleach, caustic soda, hydrogen gas, and hydrochloric acid. About 150 people worked at the LCP plant in two "cell buildings," or "cellrooms." Each cellroom, approximately the size of a football field, contained fifty mercury "cells," units used to produce the bleach, soda, gas, and acid ultimately sold by LCP. The production process generated hazardous wastes, including elemental mercury, mercury-contaminated sludges (or "muds") and wastewater, chlorine contaminated wastewater, and extremely caustic wastes with high pH values. At various times these substances were released into

1. Purvis Creek feeds into the Turtle River which flows into the ocean.

the workplace and into the surrounding marshes and waterways. These substances were also stored on site.

During 1989 and 1990, a wastewater treatment system was constructed at the LCP plant to treat wastewater before its discharge into Purvis Creek, pursuant to a permit which authorized the release of such effluent under specified limits for discharge of contaminants. Even as planned, however, that system was inadequate and could not handle the high volume of contaminated wastewater produced in manufacturing. The wastewater treatment system was also incapable of handling the contaminated sludges, or "muds," concomitant to the chlor-alkali process. Moreover, the system was never brought up to specifications and was, at best, capable of operating only at half capacity.

As time passed, the wastewater treatment system became ever more ineffective, often failing altogether to function. From 1992 on, funds and parts for repair and maintenance of the system were entirely unavailable. Effluent far in excess of permit limits was often released into Purvis Creek and the marshes. The volume of contaminated wastewater so exceeded LCP's ability to provide even partial treatment, that it backed up in the cell rooms, flooding the spaces where employees worked, creating toxic fumes, and submerging electric sump-pumps designed to keep the water level down.[2] Contaminated water was allowed to flow out of Cell Room 2 and onto the ground, where it flooded a low-lying area and

2. In 1992, after an OSHA investigation in response to union complaints, catwalks were constructed so that employees could avoid wading through the caustic, toxic water. These catwalks were soon submerged by the increasing amount of untreated wastewater.

created a large pool of hazardous waste, variously referred to by witnesses as "Lake LCP," "Lake Hanlin," or "Lake Mercury." LCP had no permits for such discharge, disposal, or storage of contaminated wastewater.

As the volume of untreated, contaminated wastewater mounted, it was pumped into railway tank cars, stored on the first floors of the cell rooms, and pumped into brick-lined tanks formerly used for oil storage (the "Bunker C tanks"). Sludge contaminated with hazardous wastes was spread on the cellroom floors in an effort to dry it before storing it in metal drums in the cellroom basements, where it was transferred from drum to drum as the containers corroded. Not only did the LCP plant have no permits for such storage or disposal, the problems with contaminated wastewater and other hazardous wastes were not properly reported to the appropriate environmental agencies or to the Occupational Health and Safety Administration.

On May 28, 1998, Christian A. Hansen, the former Chairman of the Board of Hanlin Group, Chief Executive Officer of Hanlin Group, and former acting plant manager at the LCP plant in Brunswick ("Christian"), Randall W. Hansen, who held various executive positions as financial officer and was former Chief Operating Officer at the LCP plant ("Randall"), Alfred R. Taylor, former Plant and/or Operations Manager for LCP ("Taylor"), and D. Brent Hanson, former Environmental/Safety Manager for LCP ("Brent"), were indicted and named as defendants in this criminal case.[3]

3. Given the coincidence or similarity of these Defendants' last names, the Court seeks to avoid potential confusion by referring to Defendants, Christian A. Hansen, Randall W. Hansen, and D. Brent Hanson, by their first names. No disrespect is intended.

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In Count 1 of the Indictment, all Defendants were charged with conspiracy knowingly to discharge pollutants from a point source into waters of the United States in violation of the CWA, knowingly to dispose of and store hazardous wastes without a RCRA permit, knowingly to endanger other persons in violation of RCRA, knowingly to fail to comply with CERCLA notification requirements, knowingly and unlawfully to kill or harm wood storks in violation of the ESA, and to defraud the United States, *i.e.*, the Environmental Protection Agency ("EPA") and the Occupational Safety and Health Administration ("OSHA"), in violation of Title 18, U.S.C., section 371. All four Defendants were indicted for Counts 2-21, that is, for violating the CWA by knowingly discharging or causing to be discharged pollutants (mercury and/or chlorine), except that Brent was not charged with Counts 7-9. All Defendants were indicted for violation of RCRA in that they knowingly disposed and caused the disposal of hazardous wastes without a RCRA permit, except that Brent was not charged with Count 23, Count 25, and Count 33, and Taylor was not charged with Count 33. In Count 34, all Defendants were charged with knowing endangerment of others in violation of RCRA. Christian, Taylor, and Brent were also charged with failure to notify the National Response Center of releases of a reportable quantity of a hazardous substance in violation of CERCLA in Counts 35-41. Finally, all Defendants were charged with violating the ESA by "taking" an endangered species, the wood stork.[4]

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4. The Hanlin Group, Inc., LCP's parent company, waived indictment and, on July 28, 1998, entered a plea of guilty to seven counts of conspiracy, violations of the CWA, RCRA, CERCLA, and the ESA.

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The Defendants were arraigned on June 18, 1998. They each pled "not guilty," and were released on bond. On December 22, 1998, Brent entered a change of plea pursuant to a plea bargain with the United States, in which he agreed to testify against his co-Defendants. The Court accepted his plea of "guilty" to Count 41, a failure to notify in violation of CERCLA, and to Count 42, "taking" a wood stork in violation of the ESA. The Court continued Brent's appearance bond.

Trial of the remaining Defendants, Christian, Randall, and Taylor, began on January 11, 1999. The Government presented the testimony of LCP and Hanlin Group officers, managers, and employees, as well as expert testimony pertaining to environmental harms and endangerment of LCP employees. The Government also adduced LCP documents, records, and internal LCP and Hanlin Group memos, including many signed, copied to, or received by Christian, Randall, or Taylor. Brent testified on the Government's behalf, regarding circumstances and operations at the LCP plant in Brunswick and participation by Christian, Randall, and Taylor in activities at that plant. Hugh Croom, a former manager for LCP, testified to his personal knowledge of operational, environmental, and safety problems at the Brunswick plant. Croom also testified about his communications with Christian and Randall regarding the state of affairs at the Brunswick LCP plant. Duane Outhwaite and Chris Dunn, separately indicted for violations concerning their work at the LCP plant and testifying pursuant to agreement with the Government, proffered testimony about conditions at the plant and their contacts with Christian,

Randall, and Taylor regarding both environmental and safety issues.[5]

Several former LCP employees painted a vivid picture of "hellish" conditions at the Brunswick LCP plant, testifying that they worked on and around electrical equipment while standing in caustic, contaminated water in hot rooms[6] filled with potentially explosive toxic fumes.[7] One employee described watching beads of elemental mercury rain from shovelfuls of sludge he was removing from the cellroom floor. Another described the chemical burns he suffered when he fell into the contaminated water on the cellroom floor. All spoke of the general state of deterioration and disrepair at the LCP plant, testifying that workers were surrounded by elemental mercury, mercury vapors, chlorine, acid gases, and caustic, toxic wastewater. Employees testified that, among other maintenance problems, the cellroom floors were cracked and allowed caustic wastes to leak under the buildings, where they ate away at the soil and caused the cell room foundations to sink. Jesse Jones, the employees' union

5. Mr. Outhwaite, employed by LCP from August of 1966 until February of 1994, most recently as production manager, on February 13, 1998, pled guilty to violation of the CWA. Mr. Dunn, employed at the LCP plant from March of 1979 until May of 1994, pled guilty, on May 27, 1998, to violations of the CWA and the ESA.

6. Witnesses testified that temperatures were as high as 140 degrees fahrenheit.

7. Some witnesses testified that there actually were explosions. Others appeared to distinguish between explosions within the cells themselves (cells "popping") and potential "detonation" of vapors in the cellrooms.

president, responsible for working to ensure employees' working conditions and safety, said that he had explicitly discussed concerns about plant deterioration and worker safety with Taylor, Christian, and Randall.

The Government presented expert testimony on the contamination of the LCP plant site and surrounding marshes, in addition to expert testimony about the effects of such contamination on LCP employees and on marsh fauna, particularly wood storks. Experts specifically testified about the deleterious effects of mercury on human neurological, excretory, and immune systems, as well as the health hazards posed by caustic and chlorine.

The Government concluded its case on January 14, at which time the Defendants made an oral motion for Judgment of Acquittal. The Court denied the motion, indicating that Defendants could reassert their motion after they presented their case.

Defendants presented testimony, including that of Randall and Taylor, that efforts were made to render the Brunswick operation as safe as possible, in light of the dearth of funds available for maintenance and repair. Randall testified that he attempted only "to save the business," either by reorganizing LCP to alleviate its dire financial situation, or by selling it to someone who had the resources to deal with conditions at the Brunswick site. He also testified that neither he nor Christian knowingly violated any environmental laws, but that they relied on persons at the LCP plant and on Hanlin Group's environmental and legal counsel with respect to environmental and safety issues.

Taylor's testimony focused on the logistics of plant operations and the efforts of LCP management to deal with the problems at hand. He repeatedly stressed, as did other defense witnesses, that neither he nor the other Defendants ever asked any LCP employee to falsify records. In support of the argument that the Government had overstated the contamination and attendant dangers attributable to LCP operations, Defendants adduced testimony that employees were not seriously endangered by the level of mercury to which they were exposed, as well as evidence of contamination by previous site occupiers.[8]

On January 15, 1999, Defendants rested their case. Randall made a motion, adopted by Christian and Taylor, for judgment of acquittal on Counts 1-23, 34, and 42. The Court granted judgment of acquittal on Count 42, the ESA charge, but found that the Government had presented sufficient evidence to allow the CWA and RCRA counts to be submitted to the jury. (*See* Order of January 15, 1999.)

The jury delivered its verdict late in the day on January 15, 1999, finding Christian guilty on Counts 1-41, Randall guilty on Counts 1-34, and Taylor guilty on Counts 1-3, 10-11, 22-26, 29-35, and 38-41. The jury indicated that its verdict on Count 1, the conspiracy charge, was based on its finding that the Defendants conspired to commit all of the substantive offenses alleged in the Indictment. On January 20, 1999, Christian filed a Motion for Judgment of Acquittal and a Motion for New Trial. Taylor filed similar motions on

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8. The site of the LCP plant was previously occupied by Allied Signal, the Atlantic Refining Company (now Arco or the Atlantic Richfield Company), and the Dixie Paint and Varnish Company.

January 22, 1999. On January 26, 1999, Randall filed a Motion for Judgment of Acquittal, or in the alternative, for New Trial. The Government filed a Combined Response to these Motions on February 9, 1999.

II. *STANDARD OF REVIEW*

A. *Standards Applicable to a Motion for Judgment of Acquittal*

Federal Rule of Criminal Procedure 29(c) provides that a defendant may make or renew a motion for judgment of acquittal within seven days after the jury returns its verdict. The standard a Court must apply in deciding a motion for judgment of acquittal under Fed. R. Crim. P. 29(c) is the same as that used when reviewing the sufficiency of evidence for a conviction. The Court must decide whether reasonable minds could conclude that the evidence presented to the jury is inconsistent with any hypothesis of the defendant's innocence. *See United States v. Sellers*, 871 F.2d 1019, 1021 (11th Cir. 1989) (citing *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (*en banc*)); *United States v. Shankman*, 13 F.Supp.2d 1358, 1362 (S.D. Ga. 1998). "The Government need not disprove every reasonable hypothesis of innocence; rather the government must simply prove guilt beyond a reasonable doubt." *United States v. Hayes Int. Corp.*, 786 F.2d 1499, 1506 (11th Cir. 1986). The Court must refrain from applying its own subjective interpretation of the evidence and respect the jury's view. *See United States v. Taylor*, 972 F.2d 1247, 1252 (11th Cir. 1992); *United States v. Sanchez*, 722 F.2d 1501, 1505 (11th Cir.), *cert. denied*, 467 U.S. 1208, 104 S. Ct. 2396, 81 L. Ed. 2d 353 (1984).

A motion for judgment of acquittal must be denied when a jury could accept the evidence, viewed with all reasonable inferences in the Government's favor, as adequate to support the conclusion of the defendant's guilt beyond a reasonable doubt. *See Taylor*, 972 F.2d at 1252. *See also United States v. McKinley*, 995 F.2d 1020, 1025 (11th Cir. 1993).

B. *Standards Applicable to a Motion for New Trial*

Under Federal Rule of Criminal Procedure 33, a court may grant a new trial to a defendant who has so moved the court "if the interests of justice so require." Whether to grant a new trial is a decision entirely within the Court's discretion. *See United States v. Champion*, 813 F.2d 1154, 1170 (11th Cir. 1987). In dealing with a motion for new trial, the court is not required to view the evidence in the light most favorable to the verdict. It may, rather, conduct its own subjective evaluation, weighing the evidence and making determinations of credibility. *See United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985) (citations omitted). A new trial is warranted, however, only when the Court finds that the evidence weighs so heavily against the verdict that "it would be a miscarriage of justice to let the verdict stand." *Id.* at 1313. New trials are to be cautiously dispensed and should be granted in only exceptional cases. *See United States v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988) (citations omitted).

III. *DISCUSSION*

The Court will begin its discussion by addressing Defendants' general assertion that the government did not

present enough evidence to support the jury's verdict of "guilty" as to the charged counts of conspiracy, violations of the CWA, violations of RCRA, and violations of CERCLA,[9] as well as Randall's contention that the requisite state of mind, that is, "knowingness," was insufficiently proven. Because Randall and Christian take particular issue with the sufficiency of the evidence in support of the guilty verdict on Count 34, knowing endangerment in violation of RCRA, the Court will separately address the knowing endangerment violation. Next, the Court will review the jury instructions, in light of Defendants' contention that the Court erred in charging the jury with regard to: (1) the "knowing" requirement for the CWA, RCRA, and CERCLA violations, (2) the "waste water treatment exemption" to RCRA permitting requirements, and (3) the "reportable quantity" aspect of CERCLA notification requirements. Finally, the Court will address Defendant's contention that the Court erred in denying their Motion in Limine and allowing certain charts to be introduced at trial over Defendants' objections.

A. *Sufficiency of the Evidence*

1. Conspiracy, Count 1

A conspiracy is an intentional agreement to commit an unlawful act. *Ianelli v. United States*, 420 U.S. 770, 777, 95 S. Ct. 1284, 1289, 43 L. Ed.2d 616 (1975); *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979) (discussing intent

9. Taylor was not found guilty of all counts with which he was charged. Randall was not charged with CERCLA violations. As to these Defendants, the Court's discussion pertains only to those counts for which they were found guilty.

inherent in the very notion of conspiracy).[10] To prove that a defendant is guilty of conspiracy, the government must show that he agreed to commit acts in service of an unlawful end (or a lawful end by unlawful means), that he knew the essential purpose of the agreement, and that he voluntarily agreed to assist in achieving that end. *See United States v. Valdes-Guerra*, 758 F.2d 1411, 1415 (11th Cir. 1985). *See also United States v. Corley*, 824 F.2d 931, 936 (11th Cir. 1987) ("The elements of a conspiracy . . . are an agreement between two or more persons, an unlawful purpose, and an overt act committed by one of the co-conspirators in furtherance of the conspiracy . . . the government must have shown beyond a reasonable doubt that the conspiracy existed, that [the defendant] knew about it and [he] intended to associate [him]self with the object of the conspiracy." (citations omitted)). If a defendant knows the essential object of the conspiracy, and intends to further that object, he may be convicted "even though [he] did not know all the details of the agreement or all the other conspirators and even if he played only a minor role in the scheme." *Id. See also United States v. Russell*, 703 F.2d 1243, 1250 (11th Cir. 1983) ("Every member of every conspiracy need not be an active participant in every phase of the conspiracy so long as he is a party to the general conspiratorial agreement."). Under the "*Pinkerton* doctrine," a conspirator may even be held accountable for substantive crimes committed by his co-conspirators, so long as those crimes were committed within the "scope of the unlawful project"

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10. In the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit rendered before October 1, 1981.

and could be "reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *United States v. Pinkerton*, 328 U.S. 640, 647-48, 66 S. Ct. 1180, 1184, 90 L. Ed. 1489 (1946).

A conspiracy, that is, knowing participation in an agreement to achieve a known unlawful purpose, may be sufficiently proven by direct or circumstantial evidence. *See Valdes-Guerra*, 758 F.2d at 1415 ("The agreement may be proved by direct evidence or may be inferred from the circumstances as a whole."). Association with co-conspirators, while not enough in itself to show a conspiratorial agreement, is a factor relevant to show the existence of a conspiracy. *Corley*, 824 F.2d at 937. The "acts and conduct of [a defendant] and the conspirators provide[s] relevant and competent circumstantial evidence of an agreement." *Id.*

In ruling on Defendants' Motion for Judgment of Acquittal on the conspiracy count after the evidence was presented at trial, the Court found that the Government had sufficiently proven its case:

> [T]he Government accuses Defendants of conspiring with named and unknown others to continue to operate the LCP Chlor-alkali plant in Brunswick, Georgia, when that continued operation entailed Defendants' knowing discharge of pollutants into waters of the United States, Defendants' knowing discharge and storage of hazardous wastes without a permit, and Defendants' knowing impediment of the functions

> of the EPA and the OSHA . . . The jury has been presented with evidence from which it could reasonably conclude that Defendants came to a knowing understanding with others to achieve the unlawful purpose of continuing to operate the LCP plant when that operation entailed violation of environmental laws.

Order of the Court, January 15, 1999.

A review of the trial record, as summarized in the Court's discussion of the facts, only buttresses the Court's previous conclusion. While each Defendant may not have been present at the LCP plant at the time of each alleged overt act in service of the conspiratorial agreement to continue operating the LCP plant in spite of concomitant and ongoing illegal consequences, the jury was presented with ample evidence that each Defendant both knew of and subscribed to that unlawful project. Discharge of pollutants in excess of limits provided by the CWA permit, storage and disposal of hazardous wastes in contravention of RCRA requirements, and violations of CERCLA notification requirements — all were reasonably foreseeable consequences of the Defendants' agreement. All are crimes within the scope of the conspiracy to violate environmental laws in order to keep the LCP plant in production. Neither a judgment of acquittal nor a new trial is warranted on the conspiracy charge.

2. Violations of the CWA, RCRA, and CERCLA in Counts 2-33 and 35-41

Defendants do not dispute that there is evidence of CWA, RCRA, and CERCLA violations. Defendants contend, rather,

that the evidence did not prove they, themselves, committed those violations within the meaning of the criminal provisions of the CWA, RCRA, or CERCLA. The primary thrust of Defendants' argument goes to the requisite state of mind, or *mens rea*. Alleging that they were not on site or otherwise actually aware of the violations at issue, Defendants assert that they did not intend to commit any violations and did not take any knowing actions in contravention of the CWA, RCRA, or CERCLA.

The criminal offenses with which Defendants were charged in counts 2-33 and 35-41 of the Indictment are "knowing violations" of the CWA, RCRA, and CERCLA.[11] When the term "knowingly" is used in statutes that create the criminal offense of "knowingly violating a regulation," it applies only to a defendant's knowledge that he is performing the proscribed acts. It does not encompass specific knowledge of regulatory requirements. This principle stems from *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 91 S. Ct. 1697, 29 L. Ed.2d 178 (1971), in which the Supreme Court held that knowledge of a shipping regulation was not the "culpable intent" required for violation of that regulation and stated that "where obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is . . . dealing with them must be presumed to be aware of the regulation." *Id.* at 565, 1701.

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11. Again, the Court notes that, as Taylor was not found guilty on all counts, and Randall was not charged with CERCLA violations, its discussion pertains to those counts for which the Defendants were found guilty.

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Courts construing knowledge elements in statutes dealing with use and disposition of hazardous materials have relied on *International Minerals* to hold that a defendant need not know his actions were unlawful to be found guilty. Reasoning that statutes like the CWA, RCRA, and CERCLA are "public welfare statutes,"[12] courts have declined to impose an onerous *mens rea* requirement and, instead, will presume knowledge of regulatory requirements from knowledge of the hazardous nature of materials and knowledge of acts performed in connection with those materials. This presumption is justified on the basis that CWA, RCRA, and CERCLA defendants are involved in "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health and safety." *United States v. Hayes*, 786 F.2d 1499, 1503 (11th Cir. 1986) (citing *Liparota v. United States*, 471 U.S. 419, 432, 105 S. Ct. 2084, 2092, 85 L. Ed.2d 434 (1985)).

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12. Regulatory laws in the interest of public health, safety, and welfare are deemed "public welfare" statutes and are generally subject to less stringent *mens rea* requirements than more traditional criminal laws. With regard to some public welfare statutes, the action is the crime and no particular mental state is required. *See, e.g., United States v. Park*, 421 U.S. 658, 672-73, 95 S. Ct. 1903, 1911-12, 44 L. Ed.2d 489 (1975); *United States v. Freed*, 401 U.S. 601, 609, 91 S. Ct. 1112, 1118, 28 L. Ed.2d 356 (1971); *United States v. Dotterweich*, 320 U.S. 277, 280-81, 64 S. Ct. 134, 136-37, 88 L. Ed. 48 (1943). Other public welfare statutes, like the environmental laws here at issue, incorporate a *mens rea* requirement, but, again, this requirement applies only to the act, not to the existence or meaning of regulations. *See, e.g., United States v. Balint*, 258 U.S. 250, 254, 42 S. Ct. 301, 303, 66 L. Ed. 604 (1922) (presuming awareness of regulations from the act of dealing with drugs).

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Citing *International Minerals*, the Eleventh Circuit has refused to require specific knowledge of RCRA permit requirements as an element of a RCRA violation. *See Hayes*, 786 F.2d at 1504-05. The Court indicated that a finding of guilt could rest on evidence showing that the defendant knew he was dealing with a hazardous substance and that he failed to ascertain the permit status of the facility at issue. *Id.* at 1504 ("the jurors must find that the defendant knew what the waste was . . . and that the defendant knew the disposal site had no permit"). The Court further held that "in this regulatory context, a defendant [knows when] he willfully fails to determine the permit status of the facility." *Id.* at 1505. The knowledge requirement was further fleshed out in *United States v. Goldsmith*, 879 F.2d 643 (11th Cir. 1992), where the Court stated with respect to a RCRA violator, that "[i]t is not necessary that the government prove that the defendant knew a chemical waste had been defined as a 'hazardous waste' by the Environmental Protection Agency . . . [the government] need prove only that the defendant had knowledge of the 'generally hazardous character' of the chemical." *Id.* at 645 (citations omitted). RCRA's criminal provision does "not require the government to prove that the defendant knew the waste was identified or listed under RCRA or that he lacked a disposal permit." *United States v. Hopkins*, 53 F.3d 533, 538 (2d Cir. 1995) (listing cites for the presumption of awareness of regulation). *See also United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 41 (1st Cir. 1991) (relying on evidence that the defendant was aware "hazardous waste was involved" to find that the defendant knew "the question of legality and a proper permit was critical").

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Violations of the CWA and CERCLA are based on a similarly construed knowledge requirement. A Defendant may be guilty of a CWA or CERCLA violation without being aware of the existence of the CWA or CERCLA and without knowing that his acts have legal consequences. *United States v. Wilson*, 133 F.3d 251, 264 (11th Cir. 1997) (listing cites). "[T]he Clean Water Act . . . requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense, but need not prove that the defendant knew his conduct to be illegal." *Id.* at 262. *See also United States v. Weitzenhoff*, 35 F.3d 1271 (9th Cir. 1993) ("we construe the language . . . prohibiting knowing violation of 'any permit condition' as a 'shorthand designation for specific acts' that violate the Clean Water Act") (citations omitted). A finding of guilt under CERCLA "does not demand knowledge of regulatory requirements of CERCLA; it demands only that the defendant be aware of his acts." *United States v. Laughlin*, 10 F.3d 961, 966-67 (2d Cir. 1993) (listing cites and applying the same holding to proof of RCRA violations). The government, therefore, need only have proven that Christian, Randall, and Taylor were aware that they were dealing with hazardous substances and aware of their actions or omissions that violated the CWA, RCRA, or CERCLA. Defendants do not seriously argue that they did not know they were dealing with hazardous substances. Indeed, it was the testimony of defense witnesses that the Defendants followed responsible procedures for dealing with hazardous substances. Defendants focus on the second condition for a finding of guilt, and point to an alleged insufficiency of evidence regarding their knowledge of violative acts or omissions.

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Knowledge may be proven by relevant circumstantial evidence. *Hayes*, 786 F.2d at 1504. In other words, a defendant's knowledge of violations may be inferred from the defendant's conduct, from other acts or circumstances, even from evidence showing deliberate avoidance of knowledge. The jury may draw inferences that a defendant knows that hazardous substances are being handled improperly from a defendant's failure to follow procedures set forth in statutes regulating dealings with such substances or from unusual circumstances or terms attending a transaction in which the defendant is involved. *Id.* Testimony that a defendant specifically discussed hazardous waste practices, signed documents pertaining to handling of such wastes, and was responsible for correspondence regarding the hazardous substances may serve as the evidentiary basis for a guilty verdict. *See United States v. Self*, 2 F.3d 1071, 1088 (10th Cir. 1993). Circumstantial evidence from which knowledge may be inferred include "position and responsibility of defendants such as corporate officers, as well as information provided to those defendants . . ." *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 55. Moreover, "specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question." *Id.* at 52 n.15 and 52-55.[13]

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13. It is a generally accepted inference that "the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent." *United States v. Durham*, 512 F.2d 1281, 1289 (5th Cir. 1975) (citing *United States v. Wilkerson*, 460 F.2d 725 (5th Cir. 1972)).

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If the evidence shows that the defendant "was aware of a high probability of a fact in dispute and consciously avoided confirming that fact," the jury may, in effect, assume that the defendant possessed knowledge of that fact. *Hopkins*, 53 F.3d at 542.

The jury was presented with evidence that the Defendants worked for LCP in positions of responsibility and authority while the CWA, RCRA, and CERCLA violations took place.[14] There was evidence that each of the Defendants was at the LCP plant for at least a portion of that period of time, as well as evidence that each Defendant actually viewed the deteriorating LCP facility, including the flooded cellroom and "Lake LCP."[15] Witnesses testified to discussions and correspondence with the Defendants regarding problems with wastewater and the general state of disrepair. Randall and Taylor, themselves, testified that circumstances were "very bad," and that money was unavailable for proper maintenance and repair of the LCP plant. The government also adduced various documents directed to or signed by Randall, Christian, or Taylor demonstrating their awareness of specific environmental and safety problems.

A reasonable jury, construing the evidence in the light most favorable to the Government, could infer that the

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14. *See, e.g.*, Tr., Vol. II at 160, 165 (testimony of James Mathis, vice chairman of Hanlin Group, Inc.); Tr., Vol. IV at 146, 148 (testimony of Jesse Jones, former LCP employee).

15. *See, e.g.*, Tr., Vol. III at 341 (testimony of Chris Dunn, former LCP employee); Tr., Vol. III at 358 (testimony of Duane Outhwaite, former LCP employee).

Defendants knew continued operation of the LCP plant entailed discharges in violation of the CWA, treatment, storage, and disposal in violation of RCRA, and failure to report releases in violation of CERCLA. The evidence submitted to the jury provided a more than ample basis for the jury's conclusion that Defendants harbored the mental state required for culpability.[16] Neither a judgment of acquittal nor a new trial is warranted on counts 2-33 and 35-41.

B. Knowing Endangerment

In Count 34 of the Indictment, knowing endangerment in violation of RCRA, Defendants were charged with a knowing and unpermitted treatment, storage, and disposal of hazardous wastes while knowing that such treatment, storage, and disposal placed LCP employees and other persons in imminent danger of death and serious injury from chemical burns, electrocution, inhalation of mercury vapor, and other contacts with mercury-contaminated and caustic wastes.[17] Defendants contend that the jury's verdict of guilty on Count 34 should be overturned, arguing that virtually

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16. The evidence could also support a jury verdict of guilty under the "*Pinkerton* doctrine," under which a conspirator is criminally responsible for crimes committed by his coconspirators if those crimes are reasonably foreseeable consequences and within the scope of the conspiracy. *See, e.g., United States v. Self*, 2 F.3d 1071, 1088-89 (10th Cir. 1993).

17. Under RCRA, "any person who knowingly transports, treats, stores, disposes of, or exports . . . a hazardous waste . . . who knows at the time that he thereby places another person in imminent danger of death or serious bodily injury . . ." may be subject to criminal penalties for knowing endangerment. 42 U.S.C. §6928(e).

every aspect of the Government's case was insufficiently proved. Defendants claim that there was not enough evidence for a reasonable jury to infer either their knowledge, sufficiently serious "imminent danger" to other persons, or a causal connection between treatment, storage, or disposal of hazardous waste and the alleged dangers. Relying on the notion that any "imminent danger" was normally incident to work in a chlor-alkali plant, Defendants also assert the statutory affirmative defense that the conduct charged was effectively consented to by the employees, who knew of the dangers attending work at the LCP plant and chose to continue. In addition, Defendants contest the admission of evidence regarding ruptured pipes within the LCP plant, characterizing it as evidence of "dangerous conditions and injuries resulting therefrom which are inherent in the operations of a chlor-alkali plant . . . [and] not related to the conditions of endangerment as alleged . . . in Count 34."[18]

As previously discussed, the jury was presented with evidence from which it could reasonably infer that Defendants knowingly treated, stored, and disposed of hazardous wastes without a permit. For criminal liability under RCRA's knowing endangerment provision, however, it must *also* be shown that Defendants further knew that their unpermitted treatment, storage, and disposal subjected unconsenting others to imminent health hazards of such seriousness as to implicate death or serious bodily injury. Before reaching the issue of Defendant's further knowledge, then, it must be determined whether the Government adequately proved the requisite imminent hazards.

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18. 42 U.S.C. §6928(f)(3)(A).

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1. Imminent Danger

The "imminent danger" required under RCRA may consist of an increased risk of disease or poisoning resulting from exposure to toxic chemicals or contaminants. In *United States v. Protex*, 874 F.2d 740, 742 (10th Cir. 1989), it was held that increased risks of developing cancer, solvent poisoning, and "psychoorganic syndrome" were imminent dangers within the meaning of RCRA's knowing endangerment provision. So long as employees or others are subjected to a "condition or combination of conditions [resulting from RCRA violations] which could reasonably be expected to cause death or serious bodily injury," then those persons have been imminently endangered within the meaning of RCRA. *Id.* at 744.

The jury heard testimony and perused documentary evidence showing that the conditions of operation at the LCP plant entailed potentially grave dangers to LCP employees.[19] Those conditions were directly attributable to knowing and unpermitted treatment, storage, and disposal of hazardous wastes, including mercury, caustic, and mercury and caustic contaminated wastewater and sludges. The LCP plant could not have continued operations without violating RCRA and without subjecting LCP employees to imminent health hazards far in excess of those attending normal chlor-alkali production. Witnesses testified that maintenance and repair were so deficient that the LCP plant was literally falling apart. The floor was cracked and sinking; the cells used in the

19. The evidence also supported the inference that operations at the LCP plant posed an imminent danger to any persons living near the LCP site.

manufacturing process were breached and leaking; the sump pumps were flooded and often clogged by contaminated sludges; pipes carrying caustic through the plant were ruptured and inadequately mended; and the wastewater treatment plant was often entirely nonfunctional. Operating under these conditions, the cellrooms and other spaces in which LCP employees worked were filled with explosive, poisonous vapors and flooded with caustic, toxic wastewater.[20] Witnesses testified that workers were surrounded by mercury that leaked out of the cells, precipitated from the wastewater and muds, and permeated the LCP plant's structure and site.[21]

The Government adduced expert testimony on the dangers posed to workers by contaminants such as mercury, chlorine, and caustic in the workplace. These dangers included severe chemical burns, and serious, even life-threatening, damage or risk of damage to employees'

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20. *See, e.g.*, Tr., Vol. II at 21-26, 106-11, Vol. III at 318-19, 359-60, and Vol. IV at 141-42 (testimony regarding the general state of disrepair and dangers of electrocution, explosion, caustic burns, and toxic poisoning); Tr., Vol. II at 189-90, 192-94 (regarding ruptured mercury cells, mercury contamination, and flooded cell buildings); Tr., Vol. II at 195-97 (testimony about mercury fumes and caustic burns); Tr., Vol. II at 238-39 (regarding wastewater flooding): Tr., Vol. II at 242, 284-85 (describing mercury leaking through cracks in the cellroom floor and wastewater flowing out the cellroom door); Tr., Vol. II at 336, Vol. III at 330-31 (testimony that the foundations were sinking and causing the cellroom floors to crack); Tr., Vol. III at 334-35, 352-58 (regarding overflowing wastewater).

21. *See, e.g.*, Tr., Vol. II at 192-93, Vol. III at 319-20, Vol. IV at 21-30, 166-173.

respiratory, neurological, and excretory systems.[22] Although Defendants' expert testified that the mercury level to which workers were exposed was not harmful and that contact with the caustic at issue would cause naught but "skin irritation" on the order of a "rash," the jury was entitled to make its own determination of which expert to credit. In arriving at its guilty verdict on Count 34, the jury decided that LCP employees were placed in imminent danger of death or serious bodily harm. The Court finds that the jury's determination was not unreasonable or contrary to justice.

2. Defendants' Knowledge

The issue then becomes whether the Government sufficiently proved that Defendants knew that they were subjecting LCP employees to imminent danger of death or serious bodily harm. Construing the statutory language at issue, "substantially certain to cause danger of death or serious bodily injury,"[23] the *Protex* Court reasoned that "[t]he gist of the 'knowing endangerment' provision of the RCRA is that a party will be criminally liable if, in violating other provisions of the RCRA, it places others in danger of great harm and has knowledge of that danger." *Id.* at 746. So long as a party has notice, that is, a reasonable expectation that

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22. Moreover, the dangers from the wastes discharged, discarded, or stored at the LCP plant extended to persons living in the vicinity of the LCP site. The waters of Purvis Creek and the marsh were so contaminated that fishing was forbidden and contact of any kind highly inadvisable. The jury heard testimony that the groundwater beneath the LCP site, an aquifer supplying water for human use, could be contaminated and that the soil of the site, and potentially of surrounding environs, was in itself a hazardous waste.

23. 42 U.S.C. §6928(f)(1)(C).

its conduct will result in great danger to others, that party has the requisite knowledge of "imminent danger."

Citing evidence of safety measures and protocols at the LCP plant, Defendants argue that they did not entertain a "substantial certainty" that their conduct placed LCP employees in danger of great harm. While there was some conflicting evidence on safety procedures and equipment, it was shown that the LCP plant had showers and eyewash stations intended to prevent caustic burns in case of accident, that LCP had a mercury-monitoring program in place, and that certain safety equipment, rubber boots and respirators, was most often available to employees.[24] Defendants further cite evidence that wooden walkways were installed to enable workers to walk above rather than within the pools of contaminated wastewater. Defendants gloss over the evidence showing that these safety measures, albeit potentially proper in an ordinary chlor-alkali plant, were not up to the task of dealing with the execrable conditions prevailing at the LCP plant. The walkways, for example, were soon submerged by the rising wastewater. Those portions that were not entirely beneath the toxic waters were rendered slippery, unstable, and friable by the corrosive effects of the wastewater and fumes.[25] Evidence of safety measures so clearly inadequate under the circumstances, does not compromise the jury's finding that Defendants knew that they subjected employees to imminent danger.

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24. The jury heard testimony that LCP employees were not instructed about safety rules and safety procedures. *See, e.g.*, Tr., Vol. II at 243-44.

25. *See, e.g.*, Tr., Vol. III at 322, Vol. IV at 145.

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Defendants further argue that the LCP employees "consented" to the hazard, asserting, essentially, that they "assumed the risk." It is an affirmative defense to knowing endangerment that the "conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of . . . an occupation, a business, or a profession . . ." 42 U.S.C. §6928(f)(3). Again, however, it must be stressed that while dealings with hazardous substances are inherent in manufacturing operations, the conditions and violations at the LCP plant were not "reasonably foreseeable" consequences of choosing to work at a chlor-alkali plant.[26] Defendants cannot evade criminal prosecution for knowing endangerment by contending that LCP mercury handlers, cellroom floor workers, and others should have foreseen that the Defendants would continue operating the LCP plant in spite of egregious environmental and safety violations.[27] Nor could LCP employees reasonably have foreseen that they would be exposed to levels of toxic substances far out of the norm.[28] Defendants' affirmative defense fails.

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26. The jury was able to contrast evidence of LCP operations with evidence regarding "normal" chlor-alkali production. *See, e.g.*, Tr., Vol. IV at 168-173.

27. There was testimony that LCP employees complained about conditions and, on several occasions, refused to enter workspaces that were filled with visible contaminants. *See, e.g.*, Tr., Vol. III at 320, 352, 359-60, Vol. IV at 139-141, 148, 155.

28. Evidence was introduced that levels of topic contaminants, including mercury, exceeded the permissible exposure limits ("PEL"s) promulgated by OSHA and the World Health Organization by as much as 300%. *See, e.g.*, Tr., Vol. III at 200-10, 245.

The Court will deny Defendants' motion for judgment of acquittal and new trial with respect to Count 34. A review of the evidence shows that a reasonable jury could infer that LCP employees were subjected to imminent health hazards of which Defendants were aware, which were the consequence of Defendants' RCRA violations. As the evidence does not weigh against a finding of guilty, neither a judgment of acquittal nor a new trial is appropriate.

3. Introduction of Testimony Regarding Ruptured Pipes

Defendants contend that they were prejudiced with regard to Count 34 by the admission of employee testimony about injuries suffered from ruptured pipes within the LCP plant. The pipes at issue carried caustic and chlorine for use as raw materials in the manufacturing process. Defendants thus argue that they were prejudiced by the admission of evidence regarding those pipes and employees' injuries resulting from breaches of those pipes because the testimony was not about "treatment, storage, or disposal of hazardous waste," the necessary predicate to "knowing endangerment" under RCRA.

There is no danger that the jury convicted Defendants on Count 34 because it was prejudiced by the admission of evidence on ruptured pipes.[29] The jury was clearly instructed on the requirement that knowing endangerment be based on RCRA violations, that is, on unpermitted treatment, storage, or disposal of hazardous wastes. The evidence regarding the

29. The Court notes that testimony regarding the ruptured pipes was extremely limited.

pipes was relevant to prove RCRA violations in that it showed both the grotesque decay of the LCP plant and Defendant's knowledge of that deterioration. In other words, it was circumstantial evidence supporting the Government's theory that Defendants knowingly caused the LCP plant to continue to operate with knowledge that continued operation mandated unpermitted treatment, storage, and disposal of hazardous wastes that necessarily endangered LCP employees and other persons.

Moreover, it should be noted that once the pipes ruptured and chlorine or caustic sprayed out into the environment, the chlorine or caustic may have become a RCRA "waste," thus rendering such evidence directly relevant to show that unpermitted disposal actually harmed employees. The definition of "waste" as "discarded material" is construed very broadly. *See, e.g., Zands v. Nelson*, 779 F.Supp. 1252, 1261 (S.D. Ca. 1991). *See also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1510 (11th Cir. 1996) (construing CERCLA definition of waste). Federal Regulations define discarded material as that which is abandoned by being "disposed of.". 40 C.F.R. §261.2(b). "Disposal" is defined as "leaking . . . of a hazardous waste." 42 U.S.C. §6903(3). Once a substance that has leaked is no longer useful, it becomes a "waste." *Agricultural Excess and Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, 878 F.Supp. 1091, 1095 (N.D. Ill. 1995); *Zands*, 779 F.Supp. at 1262. *See also Paper Recycling Co. v. Amoco Oil Co.*, 856 F.Supp. 671; 674-75 (N.D. Ga. 1993). The leaking chlorine or caustic, then, may be deemed a hazardous "waste."

RCRA regulations do provide an exemption for persons immediately responding to "a discharge of a material which, when discharged, becomes a hazardous waste." 40 C.F.R. §264.1(g)(8)(i). This exemption, however, is applicable only to immediate response to an unexpected leak or release. Any subsequent conduct with regard to the leaked material, or any conduct with regard to forseeable or continuing releases, IS subject to RCRA requirements. The EPA has reasoned that in such cases, the party responding to a foreseeable or continuing leak or release has time to seek, at least, an emergency permit, which can be granted orally. *See* 48 Fed. Reg. at 2509. The jury reasonably could have concluded from the evidence of LCP's history of maintenance problems that Defendants had ample notice of events like pipes breaching and, in the exercise of care for their employees' safety, as well as care for compliance with the law, should have taken action accordingly.

The evidence pertaining to pipes carrying chlorine or caustic thus did not prejudice Defendants. It was relevant to show Defendants' knowledge of deteriorating conditions at the LCP plant and Defendants' disregard of employees' safety in light of those conditions. Alternatively, it was proof of a pattern of unpermitted disposals. In either case, the admission of that evidence does not justify a judgment of acquittal or a new trial on Count 34.

C. *Jury Instructions*

Defendants have disputed the validity of the Court's charge to the jury with respect to three different issues. They allege (1) that the Court inadequately instructed the jury on

the *mens rea* requirement for the CWA, RCRA, and CERCLA offenses, (2) that the Court gave an overly restrictive definition of the "waste water treatment" exemption from RCRA permitting requirements, and (3) that the Court mischaracterized the quantity of hazardous substances needed to trigger CERCLA notification requirements. Accordingly, the Court will address each of these contentions.

1. Instructions on *Mens Rea*

The Court clearly indicated that, in order to find a defendant guilty on the conspiracy count or of "aiding and abetting" on any of the other counts of the Indictment, the jury must find that the defendant in question acted "willfully," defined as "voluntarily and purposefully, with specific intent to do something that the law forbids." The instructions pertaining to the conspiracy count repeatedly stress the absolute requirement that the government prove that Defendants knowingly and willfully participated in a conspiracy:

> Count One . . . charges that the Defendants . . . *knowingly and willfully* conspired . . . to *knowingly* discharge . . . to *knowingly* dispose of and store . . . to *knowingly* endanger . . . to *knowingly* fail to notify . . .
>
> What the evidence . . . must show beyond a reasonable doubt is . . . that the Defendants, *knowing* the unlawful purpose . . . and *intending* to further its accomplishment, *willfully* joined in . . . and *knowingly* committed . . . an overt act. . .

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> [I]f you find that a Defendant . . . *knowingly and willfully* joins in that plan . . . [and] you are convinced beyond a reasonable doubt that the Defendant *intended* to accomplish the unlawful purpose . . .

With regard to "aiding and abetting," the Court was similarly emphatic:

> [I]f the Defendant aids and abets another person by *willfully* joining together with that person in the commission of a crime . . . Before any Defendant can be held criminally responsible for [aiding and abetting] it is necessary that the Defendant *willfully* associate in some way with the crime and *willfully* participate in it . . . You must find beyond a reasonable doubt that the Defendants were *willful* participants . . .

The Court then proceeded to distinguish explicitly the *mens rea* requirement with respect to the remaining counts of the Indictment, that is, that the government prove each defendant acted "knowingly." "Knowingly" was defined as "intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness." Again, the Court highlighted the importance of finding that each Defendant under consideration had the requisite frame of mind.

In its Clean Water Act charge, the Court defined the charged offense as "*knowing* violat[ion] of a permit condition" and "*knowing* discharge [of] pollutants." In setting

out the elements that the government must prove, the Court used the following language: ". . . that the Defendant under consideration *knowingly* violated . . . ," and reiterated that "[t]he term '*knowingly*' . . . is applicable to *each* element of the offense."

Characterizing "knowing" treatment, storage, or disposal of wastes as an "essential element" in the government's proof of RCRA violations, the Court carefully instructed the jury that with respect to each of counts 22-34, "the government must *initially* prove that such Defendant . . . *knowingly* treated, stored, or disposed of at least one hazardous waste . . .". The specific RCRA definitions of "knowing" with regard to existing circumstances, a defendant's conduct, and the results of a defendant's conduct[30] were included in the Court's charge on Count 34, "knowing endangerment." The Court further refined the concept of "knowing" in its discussion of the RCRA endangerment count:

> [Y]ou must also find that the Defendant was *actually aware or actually believed* that his conduct was substantially certain to cause danger of death or serious bodily injury . . . Another person's knowledge . . . or knowledge that the Defendant should . . . or could have had does not suffice and cannot be attributed to the Defendant . . .[31]

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30. Set out at 42 U.S.C. §6928(f)(1).

31. As discussed with regard to the sufficiency of evidence, the Court's "*Pinkerton*" instruction, immediately following the quoted (Cont'd)

Finally, the Court included an instruction on the requirement that a Defendant held accountable for storage without a RCRA permit must have "*knowingly* stored hazardous waste without a permit for longer than 90 days; or . . . *knowing* failed to comply with conditions" set out in RCRA.

Again, with respect to the CERCLA charge, the Court expressly stated that a mental state of "knowing" was a necessary basis for a guilty verdict:

> The Government must prove the following elements beyond a reasonable doubt as to each Defendant: . . . that the Defendant under consideration failed to notify immediately the National Response Center of the release *as soon as he had knowledge* of the release.

The jury was abundantly instructed as to the state of mind required for culpability. The Court's directives clearly and unmistakably conveyed that a finding of willfullness, with regard to conspiracy or aiding and abetting, or knowingness, with regard to the remaining counts, was prerequisite to a guilty verdict.

(Cont'd)
portion of the Charge to the Jury, was proper. ("The Defendant may not, however, affirmatively shield himself from knowledge. You may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.")

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2. Wastewater Treatment Exemption

In detailing the mandatory conditions for permissible storage of hazardous wastes without a permit for less than 90 days, the Court included the following instruction:

> Tanks which are part of a wastewater treatment system that is subject to regulation under the CWA need not have a RCRA permit so long as they are used for the treatment of wastewater. Therefore, wastewater which is being held temporarily in such tanks is not subject to these RCRA permitting requirements.

Defendants objected, contending that the instruction was too narrow in that it excluded wastewater "held for treatment" on the cellroom floors. Defendants represented that such wastewater was "temporarily held in a container pending its intended treatment in a waste treatment system," and, as such, was not subject to RCRA requirements. Christian argued in particular that wastewater was on the cellroom floor only because it was "backed up," *i.e.*, awaiting wastewater treatment system availability.

The RCRA regulation at issue, 40 C.F.R. §264.1(g), provides that enumerated conditions for storage of hazardous waste need not be met if the wastes are stored for less than 90 days in an "elementary neutralization unit or a wastewater treatment unit." The definitions of both "elementary neutralization unit"[32] and "wastewater treatment

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32. "Elementary neutralization unit means a device which: (1) . . . and (2) meets the definition of tank, tank system, container, transport vehicle, or vessel . . ." 40 C.F.R. §260.10.

unit,"[33] incorporate the definition of "tank," and the definition of "tank system." A "tank" is "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials . . . which provide structural support," while a "tank system" is a tank for storage or treatment of hazardous waste and "its associated ancillary equipment and containment system."[34] 40 C.F.R. §260.10.

The Court's instruction accurately reflected the applicable regulation, but did not include reference to a "tank system." The cellroom floor, however, did not fall within the definition of "tank" or the definition of "tank system." The evidence showed that the cellroom floor was cracked and often covered with sludge, or "muds," as well as wastewater. Nonetheless, Defendants attempted to characterize that floor as part of a tank system, that is, "associated ancillary . . . containment." In light of common sense and the evidence, which included photographs of the cellroom floor at issue, that characterization is devoid of credibility. The Court's omission of the words "tank system"

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33. "Wastewater treatment unit means a device which: (1) . . . (2) . . . and (3) meets the definition of tank or tank system . . ." 40 C.F.R. §260.10.

34. The definition of "elementary neutralization unit" also includes "container," "a portable device in which a material is stored, transported, treated, disposed of, or otherwise handled," "transport vehicle," "a motor vehicle or rail car used for the transportation of cargo by any mode," and "vessel," "includ[ing] every description of watercraft." 40 C.F.R. §260.10. None of these is even remotely applicable to the cellroom floor.

did not affect the accuracy or applicability of its instruction regarding the wastewater treatment exemption to RCRA requirements.

3. Reportable Quantities Under CERCLA Notification Requirements

With respect to the CERCLA counts, Christian and Taylor contend that the Court erroneously instructed the jury on the quantity of released hazardous substances required to trigger statutory notice to the National Response Center. The Court charged the jury that "more than one pound of wastewater contaminated with mercury and other hazardous substances . . . released into the environment within a 24 hour period" rendered notification mandatory "as soon as [the Defendant] had knowledge of the release."

The Court's instruction was taken directly from the regulatory definition of CERCLA reportable quantities when dealing with unlisted hazardous wastes which exhibit toxicity (sometimes designated the "mixture rule"). That regulation provides: "[t]he reportable quantity applies to the waste itself, not merely the toxic contaminant. If an unlisted hazardous waste exhibits . . . toxicity on the basis of more than one contaminant, the reportable quantity for that waste shall be the lowest of the reportable quantities listed . . ." 40 C.F.R. §302.5(b). Wastewater contaminated with mercury and other hazardous substances thus would have a "reportable quantity" equivalent to the lowest reportable quantity for those hazardous substances. The reportable quantity of mercury is one pound. 28 U.S.C. §9602(a); 40 C.F.R. §302.4. The default reportable quantity for a hazardous substance is also one pound. 28 U.S.C. §9602(b).

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When dealing with a waste composed of unknown concentrations of hazardous substances, the reportable quantity for the waste is thus the same as that applied to the hazardous substance alone. *See, e.g., United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 56-57 (1st Cir. 1990) (applying the reportable quantity for toluene to toluene-contaminated soil). The Court's instruction that CERCLA reporting requirements were triggered by knowledge of a release of mercury-contaminated wastewater in excess of one pound in a twenty-four hour period was correct.

D. *Introduction of Charts*

Defendants argue that the Court erred in denying their Motion in Limine regarding charts tracking mercury levels in marsh sediments, marsh animals, and urine samples from LCP employees. Although all but one of these charts was displayed to the jury with regard to the ESA count of the Indictment, a count on which the Court granted Defendants a judgment of acquittal, Defendants nonetheless contend that they were unduly prejudiced by the introduction of this evidence.

In ruling on Defendants' Motions in Limine, the Magistrate Judge found that Defendants failed to make any showing that the charts at issue were "scientifically [in]valid," or "irrelevant and unduly prejudicial."[35] Order of the Court,

35. Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and Federal Rule of Evidence 702, trial judges may "screen out" expert testimony if it is not reliable, that is, based in scientifically valid methodology, or relevant, that is, helpful to the jury regarding the issues at hand.

January 8, 1999. Defendants renewed objections to the charts at trial, but again failed to show that the charts in question were based on invalid methodology, irrelevant to the issues to be decided, or prejudicial.

Under Federal Rule of Evidence 1006, charts and summaries are admissible as a helpful and practicable means of making the contents of voluminous writings or recordings available to the jury. Charts summarizing the results of sampling studies fall within that rule. Defendants had ample opportunity to cross-examine the government's experts and to put on their own witnesses regarding these charts. Moreover, the jury was specifically instructed as to the weight to be accorded such evidence:

> There have been admitted into evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking, the exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based on voluminous records or documents already in evidence, in order to assist you in determining the ultimate fact or results shown by such records and documents. But you are reminded that it is the records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For this purpose, you are entitled to consider them and to disregard them if they are not supported by the underlying data.

Appendix B

It is not plausible that the jury was unduly prejudiced against Defendants with regard to the conspiracy, CWA, RCRA, and CERCLA counts by its recollection of charts summarizing evidence pertaining to the ESA count (studies of marsh sediments, marsh-dwelling birds, wood stork regurgitant, and baby wood stork downy feathers). The remaining chart, which summarized the results of LCP employees' urinalysis and was relevant to the RCRA "knowing endangerment" count, was the subject of extensive testimony, both on Defendants' cross-examination of government witnesses and on the direct examination of defense witnesses, including Defendant Taylor. Defendants were not prejudiced by admission of the urinalysis chart.

Neither a judgment of acquittal nor a new trial is warranted because the Court admitted the charts at issue.

CONCLUSION

For the reasons discussed above, the motions for judgment of acquittal filed by Defendants, Christian Hansen, Randall Hansen, and Al Taylor, are **DENIED**, and the motions for new trial filed by the same Defendants are also **DENIED**.

SO ORDERED, this 26th day of April, 1999.

s/ [illegible]
JUDGE, UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA

APPENDIX C — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 26, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-11638-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRISTIAN A. HANSEN, ALFRED R. TAYLOR, RANDALL W. HANSEN,

Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BIRCH and DUBINA, Circuit Judges, and HANCOCK*, District Judge.

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* Honorable James H. Hancock, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D — RELEVANT STATUTES

33 U.S.C. § 1319

* * *

(c) Criminal penalties

(1) Negligent violations

Any person who —

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State; shall be punished by a fine of not less

than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who—

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or

condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed

after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (A) of this paragraph —

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury —

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense toprosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of —

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to

be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A.

§ 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

42 U.S.C. § 6928

§ 6928. Federal enforcement

* * *

(d) Criminal penalties

Any person who —

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter, or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.],

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter —

(A) without a permit under this sub-chapter or pursuant to title I of the Marine Protection, Research, and

Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 et seq.]; or

(B) in knowing violation of any material condition or requirement of such permit; or

(C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes any false material statement or representation in any application, label, manifest, record, report, permit, or other document filed, maintained, or used for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(4) knowingly generates, stores, treats, transports, disposes of, exports, or otherwise handles any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter (whether such activity took place before or takes place after November 8, 1984) and who knowingly destroys, alters, conceals, or fails to file any record, application, manifest, report, or other document required to be maintained or filed for purposes of compliance with regulations promulgated by the Administrator (or by a State in the case of an authorized State program) under this subchapter;

(5) knowingly transports without a manifest, or causes to be transported without a manifest, any hazardous waste or any used oil not identified or listed as a hazardous waste under this subchapter required by regulations promulgated under this subchapter (or by a State in the case of a State program authorized under this subchapter) to be accompanied by a manifest;

(6) knowingly exports a hazardous waste identified or listed under this subchapter (A) without the consent of the receiving country or, (B) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous wastes, in a manner which is not in conformance with such agreement; or

(7) knowingly stores, treats, transports, or causes to be transported, disposes of, or otherwise handles any used oil not identified or listed as a hazardous waste under this subchapter —

> **(A)** in knowing violation of any material condition or requirement of a permit under this subchapter; or
>
> **(B)** in knowing violation of any material condition or requirement of any applicable regulations or standards under this chapter;

shall, upon conviction, be subject to a fine of not more than $50,000 for each day of violation, or imprisonment not to exceed two years (five years in the case of a violation of paragraph (1) or (2)), or both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment under the respective paragraph shall be doubled with respect to both fine and imprisonment.

(e) Knowing endangerment

Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed under this subchapter or used oil not identified or listed as a hazardous waste under this subchapter in violation of paragraph (1), (2), (3), (4), (5), (6), or (7) of subsection (d) of this section who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

(f) Special rules

For the purposes of subsection (e) of this section —

(1) A person's state of mind is knowing with respect to —

(A) his conduct, if he is aware of the nature of his conduct;

(B) an existing circumstance, if he is aware or believes that the circum-stance exists; or

(C) a result of his conduct, if he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury.

(2) In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury —

(A) the person is responsible only for actual awareness or actual belief that he possessed; and

(B) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

Provided, That in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information.

(3) It is an affirmative defense to a prosecution that the conduct charged was consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of —

> **(A)** an occupation, a business, or a profession; or
>
> **(B)** medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent.

The defendant may establish an affirmative defense under this subsection by a preponderance of the evidence.

(4) All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.

(5) The term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership,

joint stock company, foundation, institution, trust, society, union, or any other association of persons.

(6) The term "serious bodily injury" means —

(A) bodily injury which involves a substantial risk of death;

(B) unconsciousness;

(C) extreme physical pain;

(D) protracted and obvious disfigurement; or

(E) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

* * * *

42 U.S.C. § 9603

§ 9603. Notification requirements respecting released substances

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a

hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person —

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release,

in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Notice to Administrator of EPA of existence of storage, etc., facility by owner or operator; exception; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has

been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: Provided, however, That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

* * * *